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ABSTRACT

Since present justice jurisdiction of American Indian Lands is based solely on racial criteria with minimum regard for current Indian status of law enforcement needs and since Congress is presently considering complete revision of major criminal legislation relative to such jurisdiction, there is good reason to assess the present status and future possibilities of the division of criminal jurisdiction in Indian lands. Division of Indian criminal jurisdiction among the Federal, state, and tribal governments makes the present system both overly complex and inefficient. In general, the rules governing jurisdiction allocations are: (1) tribes have, with exceptions, jurisdiction over offenses committed by Indians against Indians in Indian country; (2) states have jurisdiction over offenses committed by non-Indians in Indian country; (3) the Federal government and the states potentially have jurisdiction over offenses committed by non-Indians against Indians in Indian country; (4) Indian tribes and the Federal government have jurisdiction over offenses committed by Indians against non-Indians; (5) states have jurisdiction over offenses committed by any of the above outside Indian country. The National Commission on Reform of Federal Criminal Laws has published its Working Papers which restate prior law framed in terms of proposed criminal code and indicate jurisdiction validity will rest upon "special knowledge and intensive study". (JC)

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CONFLICTS OF CRIMINAL JURISDICTION ON INDIAN LANDS

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INTRODUCTION

The present status and future possibilities for the division of criminal justice jurisdiction in lands occupied substantially by Indians is the topic of this paper. The paper is provoked by two factors: (1) the present division of jurisdiction in Indian country is based solely on racial criteria, with minimal relation to present status of Indians and present needs for law enforcement, and (2) the Congress is presently considering a complete revision of Title 18, U.S.C. proposed by the National Commission on Reform of Federal Criminal Laws.

The commentaries on the division of criminal jurisdiction in Indian country are a monument to the complexity of the subject. They are content generally to attempt only an exposition of what is, this in itself involves substantial effort. With the Omnibus Crime Act of 1968, and emphasis on comprehensive planning for law enforcement, another approach is suggested. That is, what is the impact of this complicated division of jurisdiction in Indian country upon the effectiveness of law enforcement? The consideration by Congress of the suggested revision of Title 18, which presently includes the major criminal provisions regarding jurisdiction in Indian country makes such an assessment both proper and timely.

II.

Recent cases brought under the Major Crimes Act have indicated that discrimination may exist against Indians charged with federal criminal offenses specifically relating to Indians. Other discriminations may exist as well against Indians, in that the complex racial and territorial bases for the present division of jurisdiction may result in a wastage of present resources devoted to the maintenance of order in Indian country, or to a less than sufficient allocation of resources for enforcement of criminal sanctions in Indian country. There is a need for at least public mention of these potential law enforcement difficulties.

The present division of criminal jurisdiction in Indian country is among three sovereignties; the federal government, the state governments and the tribal governments. The division is made on the bases of the races of offender and victim, the offense and the locus of offense. It is the basic premise of this paper that the present allocation of jurisdiction in Indian country is both overly complex and inefficient in view of available manpower and resources. The dangers of complexity add unnecessary problems to the criminal law system for both the governments involved and for criminal defendants. Suggested revisions of present statutes which may lead to a less complex allocation of jurisdiction will be made in the last section of this paper; the recommendations of the National Commission on Revision of Federal Criminal Laws will also be discussed in the last section.

THE ALLOCATION OF CRIMINAL JURISDICTION IN INDIAN COUNTRY

Criminal jurisdiction in Indian country is allocated on the bases of the races of criminal offender and victim, the offense involved and the locus of the offense. It is allocated to the federal government, the states and the Indian tribes; the government which has jurisdiction over any particular offense and offender is determined by the tests of race, offense and locus of offense.

Normally, "jurisdiction" refers to the power of courts to hear and determine controversies, and to make and enforce final adjudications.[1] The topic of criminal jurisdiction in Indian country involves more than the power of courts to adjudicate controversies. Governmental power, in its broadest sense, is allocated among the three governments. In Indian country, legislative jurisdiction, or the power to make laws regulating or proscribing behavior is allocated,[2] as well as is executive jurisdiction, the power to enforce laws[3] and execute judicial process.[4] The judicial powers of determining guilt or innocence and of pronouncing sentence are also allocated among the three governments.[5] With separations of legislative, executive and judicial jurisdiction, in Indian country there are three sets of criminal laws, three law enforcement systems and three judicial systems.

Jurisdiction as used in this paper will refer to governmental power to regulate, prohibit, prevent and punish antisocial behavior of the type

generally classified as criminal. The statement, for example, that Indian tribes have jurisdiction over misdemeanor grade offenses by Indians against Indians in Indian country will be a shorthand statement for the proposition that the Indian tribe has legislative jurisdiction, executive jurisdiction and judicial jurisdiction over Indian intra-racial behavior.

The rules for allocation of criminal jurisdiction in Indian country which have been developed by courts and Congress and which are stated in this section should thus be related to both governmental power generally, and to the specific context of the powers of courts to hear and determine criminal cases. The jurisdiction of each of the governments allocated governmental power in Indian country will be set out. These rules, it should be noted, are for the actual exercises of governmental power. Where a government may possess the power to regulate behavior, but has not exercised the power, the scope of potential power will be indicated.

FEDERAL CRIMINAL JURISDICTION

Federal power over Indian affairs results predominantly from the Commerce[6] and the Public Lands clauses of the Constitution. Prior to 1871,[7] the federal government dealt with Indian tribes on the basis of treaties, so that the treaty power constituted an important source of federal power over Indians. In the leading case of Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1835), Chief Justice Marshall, in dicta,

laid the groundwork for the fourth source of federal power over Indian affairs and Indians -- the guardian-ward relation. He stated of the Constitution:[8]

> "That instrument confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several states, and with Indian tribes. These powers comprehend all that is required for the regulation of all intercourse with the Indians. They are not limited by any restrictions on their free actions:..." (Emphasis added.)

The Supreme Court has often viewed these powers as an amalgam, and paid close attention to the relation between the United States and the Indian. Federal power over Indians is thus sustained in several opinions on the basis of the necessity that the federal government have sufficient power to meet its responsibilities to its dependent wards.[9] In U. S. v. Kagama, 118 U.S. 375 (1886), the Court made the following statement about the power of the federal government over Indians, while upholding Congressional power to extend federal jurisdiction to offenses by Indians against Indians within the reservations, within state boundaries:

> "It seems to us that this is within the competency of Congress. These Indian tribes are wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them(,) and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen."[10]

The duty of the federal government, and the requisite power, have been characterized as a "new" source of power for Congress, the power to regulate Indians.[11] Thus, the power of Congress over the Indians and the Indian tribes is the equivalent of a state's power over its citizens, and may be described as plenary.[12]

The plenary power doctrine means that Congress possesses sufficient power to provide a complete code, regulating Indian behavior through criminal sanctions. Federal criminal jurisdiction, as provided in 18 U.S.C., Part II, Sections 1151, et. seq., does not occupy the potential field of federal power. The federal government does take jurisdiction over major crimes by Indians against Indians, and over interracial offenses, involving Indians and non-Indians as offenders and victims.[13] Federal special jurisdiction over offenses by Indians against Indians is limited to the offenses enumerated in 18 U.S.C., Section 1153, the so-called "Major Crimes Act."[14] This section presently provides that:

> "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which

> the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.
>
> As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed."

Jurisdiction under the Major Crimes Act is exclusively in the federal courts,[15] precluding both the states[16] and the tribes[17] from exercising jurisdiction.

The rest of the federal criminal code applicable in Indian reservations on a territorial basis is included in 18 U.S.C. Section 1152, which incorporates both federal enclave law and the Assimilative Crimes Act[18] into the body of federal criminal law applicable in Indian country. This section provides that:

> "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

Federal jurisdiction over offenses by Indians against the persons or property of Indians is excepted by Section 1152, so that, except as

limited by the Major Crimes Act, the Indian tribes possess exclusive jurisdiction over these offenses.[19] The exception provided for Indian tribes with treaties granting them exclusive jurisdiction over offenses adopted by Section 1152 is no longer important, as no treaties exist giving Indian tribes such exclusive jurisdiction.[20]

The section thus applies to crimes by Indians against the person or property of non-Indians,[21] and to crimes by non-Indians against the persons or property of Indians, in Indian country.[22] The status of offenses by Indians without victims is unclear. The tribes generally exercise jurisdiction over minor offenses without victims including traffic offenses,[23] while the federal government has prosecuted offenses by Indians without victims, under Section 1152 and the Assimilative Crimes Act.[24] There is apparently no case law on the question of whether offenses by non-Indians without victims in Indian country are subject to federal prosecution.[25] Federal jurisdiction over offenses by Indians against the persons or property of non-Indians has long been qualified by an exception now codified in 18 U.S.C. Section 1152, which provides that punishment of the offender by the Indian tribe is a jurisdictional bar to federal prosecution.[26]

Under this allocation of criminal jurisdiction, the federal government bears law enforcement responsibilities for protection of persons in Indian country, if they are Indians, from major crimes, and if inter-racial

contact is involved, of both Indians and non-Indians, from crimes by the members of the other race.[27] To the extent that reservation areas are open to non-Indians and inter-racial contact occurs, the federal law enforcement responsibility increases.

STATE CRIMINAL JURISDICTION

By the Indian Intercourse Act of 1802, the Congress provided federal jurisdiction of certain specific offenses committed in an inter-racial context.[28] By the Act of March 3, 1817, 3 Stat. 383, the Congress made the corpus of federal enclave law applicable to Indian country, with an exception for Indian intra-racial offenses. There are no racial limitations in this early statute, nor in those subsequent federal statutes which substantially continued the same rule in effect.[29] Thus, the sections could be fairly read as extending federal jurisdiction to include offenses by non-Indians against the persons or property of other non-Indians. The law was so construed in U.S. v. Rogers, 45 U.S. (4 How.) 567 (1846), in which the conviction of one non-Indian adopted member of the Cherokee tribe for the murder of another non-Indian adopted member in Federal Court was upheld. The Court, however, carefully restricted the construction of the 1834 Indian Intercourse Act to territories, and distinguished without ruling the question of whether the same federal power would exist when such an offense occurred within a state.[30]

The Supreme Court considered the question in three cases, U.S. v McBratney, 104 U.S. 621 (1882), Draper v. U.S., 164 U.S. 240 (1896), and State ex rel Ray v. Martin, 326 U.S. 496 (1946), and in each held that the state possessed

jurisdiction. These decisions are premised on the assumption that the intra-racial behavior of non-Indians toward each other has no direct impact on Indians.

Although these decisions have been criticized,[31] they have been restated as dicta in two cases, Williams v. U.S.,327 U.S. 711 (1946) and Williams v. Lee, 356 U.S. 930 (1959).

None of these cases deal explicitly with the important question of whether this jurisdiction is exclusive with the state, and beyond the power of the federal government.[32] This question will be discussed below in reference to potential modifications of the present jurisdictional allocation. The states do generally exercise jurisdiction of non-Indians, or non-Indian offenses without victims.[33] Under this allocation of criminal jurisdiction, a state's law enforcement responsibilities in Indian country could be expected to increase to the extent that resident or transient non-Indian population on Indian reservations increases.

INDIAN TRIBAL CRIMINAL JURISDICTION

It has long been the view that Indian tribal power to regular intra-racial behavior of Indians within Indian country is a result of Indian tribal status as quasi-sovereign, domestic dependent nations, with the power to regulate domestic affairs in absence of restraint by the superior power, the United States.[34] Even this doctrine, which bears the stamp of hoary antiquity and repeated Supreme Court endorsement, has recently been challenged. The present form of Indian tribal governments, the manner of

their exercise of power, their constitutions, law codes and courts, is largely the result of the Indian Reorganization Act of 1934.[35] The argument has been made that the federal government, through the Reorganization Act, so modified the self-government of Indians that tribal governments are not expressions of tribal powers of self-government, but rather agencies of the federal government.[36] While the Tenth Circuit has rejected this argument, sub silentia, in Native American Church v. Navajo Tribal Council, 272 F.2d 131 (CA 10 1959), it has been accepted by the Ninth Circuit, in two recent cases, Colliflower v. Garland, 342 F.2d 369 (1965) and Settler v. Yakima Tribal Court, 419 F.2d 486, cert. den. 398 U.S. 903.[36a] These legal doubts about the sources of tribal powers will be discussed below. All that need be recognized here is that under either theory, the Indian tribes exercise jurisdiction over offenses by Indians against Indians or non-Indians,[37] and over offenses by Indians without victims.[38] The federal government has undertaken jurisdiction over only a part of these offenses,[39] and the states lack jurisdiction over all of them.[40] Thus, the Indian tribes bear law enforcement responsibility for the regulation of behavior by Indians toward each other in Indian country, and for the behavior of Indians when offenses with non-Indian victims, or no victims, are involved. The scope of these responsibilities is subject to Congressional control, so that they may be entirely abrogated, or subjected to statutory controls over the methods which are used to exercise the responsibility.[41]

INDIAN COUNTRY

The applicability of the allocations of jurisdiction in Indian country is dependent upon whether the locus of the offense is Indian country. If an offense involving an Indian occurs outside Indian country, there are no special jurisdictional rules.[42] The Indian is subject to state and federal[43] criminal jurisdiction as any other person would be under the circumstances. While it may be said that the definition of Indian country in specific instances has been difficult,[44] certain basic requisites for land to be Indian country can be stated. A recognized tribal group[45] must receive the kinds of federal services or protections offered to Indians generally[46] and of primary importance, the land which the Indians occupy must be subject to restrictions on alienation or other forms of federal protection of tenure,[47] or be held by the United States with the beneficial interest in the Indians.[48] The Indian right of occupancy or title must have aspects of permanence.[49]

The definitions of Indian country arrived at by the Supreme Court have been codified in the present 18 U.S.C. Section 1151, which provides that:

> "Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

In areas of reservation, or contiguous allotments, this definition serves as a sufficient description of boundaries to provide guidance for law

enforcement officers. However, in areas of fragmented land ownership, the problem of territoriality can be sufficiently complex to dissuade governments or officers from providing law enforcement services.[50]

NOTES

1. 21 C.J.S. "Courts" Sec. 15.

2. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

3. See, e.g. Application of Denetclaw, 93 Ariz. 299, 320 P.2d 697 (1958).

4. Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970).

5. See, e.g. Petition of Carmen, 165 F.Supp. 942 (DC Cal. 1958), aff'd sub nom Dickson v. Carmen, 270 F.2d 809 (CA 9 1959), cert. den. 361 U.S. 973. Light on the complexity of problems of criminal jurisdiction in Indian country can be gleaned from these cases, and the summary of prior proceedings in the opinion of District Judge Goodman, 165 F.Supp. 942. Petitioner from 1954 to 1958 remained in death row in California prison, though it appeared that the offense charged was a murder of an Indian, by an Indian, in Indian country.

6. Commerce clause: U.S. Constit. Art. 1, Sec. 8, Cl. 3.; Public Lands clause: U.S. Constit. Art. 1, Sec. 8, cl. 17. See also, Cohen, Handbook of Federal Indian Law, 1940, pp. 89-100.

7. Act of March 3, 1871, 16 Stat. 554, R.S. Sec. 2079. This enactment ended the course of dealing with Indian tribes by treaties, although the Congress continued to use agreements, enacted as statutes, for some time.

8. Cohen, Handbook of Federal Indian Law, pp. 89-90.

9. Cohen, Handbook of Federal Indian Law, p. 90, quoting from Perrin v. U.S., 232 U.S. 478, 486 (1914), Gritts v. Fisher, 224 U.S. 640, 642-3 (1912), U.S. v. Thomas, 151 U.S. 577, 585 (1894).

10. 118 U.S. 375, 383-384.

11. Cohen, Handbook of Federal Indian Law, p. 89.

12. Id., p. 91.

13. Special jurisdiction is used here in the sense of jurisdiction based on federal power over areas within the exclusive or concurrent jurisdiction of the United States, See 18 U.S.C. Sections 7, 1152. Offenses grounded in other sources of federal power, which are not contingent upon the locus of the offense, apply to Indians, as they apply to other citizens. See Davis, Criminal Jurisdiction over Indian Country in Arizona, 1 Ariz. L. Rev. 62, and Bailey v. U.S., 47 F.2d 702 (CA 9 1931).

14. See U.S. v. Kagama, 118 U.S. 375 (1886); U.S. v. Quiver, 241 U.S. 602 (1916); U.S. v. Davis, 429 F.2d 552 (CA 8 1970); Glover v. U.S., 219 F.Supp. 19, 20 (DC Mont. 1963).

15. See 18 U.S.C., Section 3231.

16. In Re Petition of Carmen, supra., note 5; Ex Parte Pero, 99 F.2d 28 (CCA 7 1938); Ex Parte Van Moore, 221 F. 954 (DC SD 1915).

17. Sam v. U.S., 385 F.2d 213 (CA 10 1967); U.S. v. Whaley, 37 F. 145 (CC SD Cal 1888). There remains some question on whether tribal jurisdiction is excluded, see Cohen, Handbook of Federal Indian Law, p. 147; Davis, supra note 13, p. 71.

18. 18 U.S.C., Sections 7, 13.

19. See Indian Tribal Jurisdiction, infra.

20. See Cohen, Handbook of Federal Indian Law, p. 365.

21. Ex Parte Pero, 99 F.2d 28 (CCA 7 1938), cert. den. 306 U.S. 643; State ex rel Irvine v. District Court, 125 Mont. 398, 239 P.2d 272 (1951); State y. Pepion, 125 Mont. 13, 230 P.2d 961 (1951).

22. Donnelly v. U.S., 228 U.S. 243 (1913); U.S. v. Pelican, 232 U.S. 442 (1914); Guith v. U.S., 230 F.2d 481 (CA 9 1956).

23. See Chapter 14, Navajo Tribal Code, 1969 Rev.; See also State v. Begay, 63 N.M. 409, 320 P.2d 1017 (1958); Application of Denetclaw, supra note 3.

24. U.S. v. Sosseur, 181 F.2d 873 (CA 7 1950). This case assures that enterprising Indians may assimilate only the white man's virtues, but not his vices. Here, with approval of their Tribal Council, enterprising Indians established a gambling emporium within their reservation. However, state law, as applied through the Assimilative Crimes Act, was held to make their actions criminal. Because it subjects Indians to criminal liability for behavior approved by their government, Sosseur should be criticized as both unfair and contrary to Indian tribal rights of self-government.

25. Davis, supra note 13, at p. 74.

26. Act of March 3, 1817, 3 Stat. 383. See U.S. v. LaPlant, 156 F.Supp. 660,662 (D.C. Mont. 1957).

27. From the early Intercourse Acts, e.g. Act of March 3, 1817, the federal government maintained statutes restricting entry onto, or presence within, Indian reservations. Indian Agents were given broad powers of removal, and military force was usable for the purpose of removal of non-Indians from Indian country. See R.S. Sections 2147-2149. Compare, Dodge v. Makai, 298 F.Supp. 25 (D.C. Ariz. 1969).

28. Act of March 30, 1802, 2 Stat. 139.

29. Act of June 30, 1834, 4 Stat. 729; Act of March 27, 1854, 10 Stat. 270; R.S. Sections 2145, 2146; 18 U.S.C. Section 1152.

30. 45 U.S. (4 How.) 567,572 (1846).

31. Davis, supra note 13, p. 70.

32. An 1834 federal decision, U.S. v. Bailey, 1 M'Lean 234, Fed. Cas. #14,495, 24 Fed.Cas. 937, holds that the federal government lacks power to make criminal laws applicable over state laws in Indian country. See contra, U.S. v. Kagama, supra, note 14. In People ex rel Ray v. Martin, 326 U.S. 496 (1946), at 500, the Supreme Court notes that the decisions have fallen both ways, depending upon whether a state or territory is involved. The premise underlying these decisions is that non-Indian intra-racial behavior can have no impact upon Indians, or Indian tribes. In U.S. v. Bailey, supra, 24 Fed.Cas. at 939, it is said:

> "A murder has been committed by one white person on another within the Indian territory which act in no respect is connected with the commerce of ***Indians, or interferes with their prosperity or safety."

This analysis would not seem sufficient, as a gun fight between non-Indians at a place frequented by Indians, or any violent crimes in public on reservations would seem likely to have an impact upon individual Indians. Likewise, a speeding non-Indian on a reservation highway is as likely to collide with an Indian in another auto, as he is a non-Indian.

33. Davis, supra note 13, pp. 74,77.

34. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Williams v. Lee, 358 U.S. 217 (1958); Cohen, Handbook of Federal Indian Law, pp. 122-150, esp. p. 136, n. 213.

35. Act of June 18, 1934, 48 Stat. 984.

36. and 36a. Note, "The American Indian: Tribal Sovereignty and Civil Rights," 51 Iowa L. Rev. 654 (1966); Oliver, "The Legal Status of American Indian Tribes" 38 Ore. L. Rev. 193, 232 (1959); See, also, Appellant's Brief in Chief, No. 6146, Court of Appeals for the Tenth Circuit, in Native American Church v. Navajo Tribal Council.

37. 18 U.S.C. Section 1152; Cohen, Handbook of Federal Indian Law, p.146.

38. See Application of Denetclaw, supra note 3; Navajo Tribal Code, Title 14 (1969 Rev.).

39. 18 U.S.C. Section 1153; U.S. v. Davis, 429 F.2d 552 (CA 8 1970).

40. Williams v. Lee, supra note 34; 18 U.S.C. Sections 1152, 1153.

41. General termination legislation can be found at 67 Stat. 588, Act of August 15, 1953; see 18 U.S.C. Section 1162. See also Act of April 11, 1968, Pub. L. 90-284, 25 U.S.C.A. Section 1301 et seq. (The Indian Civil Rights Act).

42. State v. Big Sheep, 75 Mont. 219, 243 Pac. 1067 (1926); State v. Youpee, 103 Mont. 86, 61 P.2d 832; Pablo v. People, 23 Colo. 134, 46 P.2d 636 (1896).

43. Bailey v. U.S., 47 F.2d 702 (CCA 9 1931).

44. See, e.g., Tooisquah v. U.S., 186 F.2d 93 (CA 9 1950).

45. U.S. v. Booth, 161 F.Supp. 269 (D.C. Alas. 1950).

46. See U.S. v. McGowan, 302 U.S. 535 (1938); U.S. v. Booth, supra note 45.

47. U.S. v. Sandoval, 231 U.S. 28 (1913).

48. U.S. v. McGowan, supra note 46.

49. Thus, Indian boarding schools are generally held not to be Indian country. See Cohen, Handbook of Federal Indian Law, p. 8.

50. This situation has occurred in the Eastern Navajo Agency, an off-reservation area occupied predominantly by Navajos. The area is checkerboarded. See 1971 Indian Justice Planning Project Manual, "Dine' Da Ho Ahgi'", pp. 113-140.

SECTION II

ORIGINS OF THE ALLOCATION OF CRIMINAL JURISDICTION IN INDIAN COUNTRY

As indicated in the preceding section, the present allocation of criminal jurisdiction in Indian country is based on three variables; the races of the offender and the victim, the offenses alleged and the title or status of the land upon which the offense occurred. Jurisdiction is divided among three governments; the states, the Indian tribes and the federal government. With the possibility that differences in any one of the three variables may shift jurisdiction from any one of the governments to another of the three, it is not startling to say that the allocation of criminal jurisdiction in Indian country is exceedingly complex. Under these circumstances, simply stating the legal rules governing the present allocation of jurisdiction is a task; their application poses greater problems.

The complexity of the legal rules should not be allowed to obscure the relatively simple premises underlying the allocation of criminal jurisdiction. The entire set of these premises was established in 1885, and the basic premises were set by 1834.[1] The first premise is that members of the different races could not be fairly prosecuted, tried and punished according to the customs or laws of the other race. The second premise is that governmental interests in law and order could be functionally separated on the basis of the races of the offender and victim. The third premise is that of strict adherence to the principle of territorial division of criminal jurisdiction.

The derivation of these principles results in part from an historical view of the allocation of criminal jurisdiction in Indian country, and from the general rules governing the allocation. These rules are generally as follows:

(1) Indian tribes have, with exceptions, jurisdiction over offenses committed by Indians against Indians in Indian country,

(2) States have jurisdiction over offenses committed by non-Indians in Indian country,

(3) The federal government, and the states potentially, have jurisdiction over offenses committed by non-Indians against Indians in Indian country,

(4) The Indian tribes and the federal government have jurisdiction over offenses committed by Indians against non-Indians in Indian country, and

(5) States have jurisdiction over offenses committed by any of the above outside of Indian country.[2]

The first premise underlying these rules is that cultural differences generally preclude the trial and punishment of offenders of one race by the courts of the other race. The cultural differences between the Indians and the white man were thought to preclude making either race subject to the other's rules regulating and punishing behavior. The history of federal statutes governing jurisdiction in Indian country demonstrates that this is one of the central premises of the rules dividing power to regulate behavior by criminal law.

Early federal statutory enactments dealing with criminal jurisdiction in Indian country were the Act of May 19, 1796, 1 Stat. 479, and the Act of March 30, 1802, 2 Stat. 139. Under these Acts, offenses committed by Indians against whites, and by whites against Indians were specifically

set out and defined, and no further provisions were made.[3] The Act of March 3, 1817, 3 Stat. 383, altered this division by providing that the criminal laws of the United States relating to areas within the sole and exclusive jurisdiction of the United States were extended to all persons in Indian country, with the exception of offenses by Indians against Indians.[4]

The document establishing the basic premises of the allocation of criminal jurisdiction in Indian country was the Act of June 30, 1834, 23rd Cong., 1st Sess.,Ch. 161, 4 Stat. at L. 729. Section 25 of this Act, popularly known as the Indian Intercourse Act, was as follows:

> "And be it further enacted, that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force and effect in the Indian country: Provided, The same shall not extend to crimes committed by one Indian against the person or property of another Indian."

The House Report which accompanied this proposed Section was drafted with reference to three bills submitted by the Committee to the Congress. One related to the Indian service,[5] one to trade and various restrictions on white men within Indian reservations,[6] and the third proposed the establishment of a separate territory and government for the Indians, with a view toward making the Indian territory an eventual state of the Union.[7] The report noted that the members of each race, under conditions then extant, should have the benefits of trial within their own cultural context:

> "It will be seen that we cannot, consistently with the provisions of some (of) our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and that it is rather of courtesy than right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, at any place within their own limits."
> (Emphasis added.)

Fear of the results for whites of subjection to Indian law led the federal government to assume jurisdiction, whenever a white offender or victim was involved.

The exception provided for offenses by Indians against Indians, out of respect for their governmental status, and their differing customs and criminal law systems, represented a significant departure from other views held in the 1830's. Several states[8] attempted during the decade to extend their criminal laws to include offenses by Indians against Indians in Indian country. These extensions were accompanied by extensions of civil jurisdiction, and jurisdiction over Indian lands. See the Georgia laws, set out in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Chancellor Kent commented of the Georgia laws:

> "The purpose and effect of those laws was, to demolish the Cherokee government and institutions, and annilate their political existence as a nation, and to divide their territory among the adjoining counties in Georgia, and extend the civil and criminal law of the state over the Indian territory." III Kent's Commentaries, p. 382.

The power of the federal government over Indian country, and the lack of state jurisdiction, was established in Worcester, though the law was of

little aid to the Indians in fact.[8a] Protection of Indians and Indian tribes has since been a justification for the exercise of federal power over Indians,[8b] and, some argue, remains today as a justification.[8c] But federal protection of Indians from states, beyond underlying the exclusiveness of federal legislative jurisdiction, did not have a measurable influence on the allocation of jurisdiction between the federal government and the Indian tribes. The origins of the exception for offenses by Indians against Indians in Indian country lie in the federal recognition of Indian tribal quasi-sovereign status, and in the federal recognition of the differences among the Indian tribal cultures and the Anglo-American culture.

Perhaps the most imposing justification for this exception is stated in Ex Parte Crow Dog, 109 U.S. 553 (1883). It is as follows:

> "It is a case of life and death. It is a case where against an express exception in the law itself, that law, by argument and inference, is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning, which judges them by a standard made by others and not for them, which takes no account of the conditions which should exempt them from its exactions, and makes no allowances for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor by the law of their land, but by superiors of a different race, according to the law of a social state of which they have but an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality." 109 U.S. 553,571.

The premise that the behavior of Indians toward each other should not be tested by white man's standards because the Indians were of a different culture gave way when a white man became involved as the victim of a crime committed by an Indian. This placed a risk of non-conformity with "unknown" criminal standards upon the Indian. The potential deterrent effect of the white man's standards on Indian behavior would seem to be minimal, unless the Indian assimilated a requisite minimum of white criminal standards. This was exactly the burden -- the burden of learning the "arts of civilization" -- which was placed upon the Indian. The 1834 House Report contained a third bill which would have established a confederation of Indian tribes in a separate Indian territory, with the eventual goal of establishing a state. The bill proposed that an Indian judiciary modeled after the anglo courts be established. Indian government and judiciary would assume jurisdiction over all non-Indians not required by federal law or treaties to be present in the Indian territory, with a veto power reserved to a non-Indian governor. Thus, the bill contemplated that, with the assimilation by the Indians of a modicum of the "arts of civilization", in their own country, the risk of non-conformity with the standards of the other race would be transferred to the whites present in the country.[9]

By the Act of March 27, 1854, an exception to the rule that Indian offenders were subject to federal punishment for offenses against whites was established. If the Indian were punished under the local law of his tribe, he would not be subject to federal trial or punishment. The

substance of this exception indicates that fear of Indian tribal leniency or forgiveness of offenses by tribal members against whites was a basis for the earlier scope of federal jurisdiction.

The fear of Indian tribal solicitude for tribal members cut another way. As noted, whites committing offenses against Indians were subject to federal, not tribal, jurisdiction. The rules were developed then, not with reference to the interest of the tribal or federal government arising from the race of the victim, but from the viewpoint of the potential culturally-caused difficulties in law enforcement. The 1834 Committee Report devotes some discussion to the severity of Indian punishments.[10] The possibility of federal punishment was perhaps thought sufficient to deter crimes against Indians, while the severity of Indian punishments and the possibility of resentment caused by aggravated punishments of whites by Indians meant that the federal government assumed jurisdiction over all inter-racial offenses. Thus, though the federal government recognized that jurisdiction should follow race, in the case of Indian offenses against Indians, jurisdiction in the case of inter-racial offenses was used as a limiting device to prevent potentially prejudicial effects to non-Indians arising out of laxity with respect to Indians committing crimes against whites, or severity with respect to whites committing crimes against Indians.[11]

The traditional police powers of states have been held to extend to all persons within their boundaries.[12] The state interest in preventing criminal behavior is a governmental interest, grounded in the maintenance

of peace, safety and order for the benefit of the general citizenry.[13] Thus, the state, rather than individual citizens, has standing to prosecute criminal causes of action.[14]

No such concern for unitary governmental interest in the maintenance of peace and order within the territorial limits of a government appears in the division of criminal jurisdiction in Indian country. Under the 1834 Indian Intercourse Act, the governmental interest was arranged by race. The Indian tribes had an interest in maintaining peace and order in the relations among Indians. The federal government assumed the interest of maintaining order in the relations between the races, and among non-Indians in Indian country.[15]

The separation of governmental interest in behavior by persons within Indian country on the basis of race reached its apogee in the case of non-Indians' behavior toward other non-Indians. The notion sustaining the breadth of state police power was that an individual's behavior has an impact on the entire citizenry of the state, through the government. In contrast, the notion with regard to Indian country was that the intra-racial behavior of individuals did not have any impact upon members of the other race. Thus, Indian tribes were thought able to regulate intra-racial Indian behavior without having an effect on non-Indian intra-racial behavior. The conclusion was then easy, that intra-racial behavior among non-Indians had no effect on intra-racial behavior among Indians.

The idea of the racial separation in police powers may have arisen in the belief that it would be unfair to subject members of one race to trial and punishment under the laws of the other race, unless there was a modicum of similarity between the two.[16] Whatever its origins, however, separation based on race received a new justification. The intra-racial behavior of the members of one race was simply held to have no actual impact upon the members of the other race.[17] The idea that non-Indian intra-racial behavior had no impact upon the Indians led to the introduction of a third sovereignty in Indian country -- the states. In U.S. v. McBratney, 104 U.S. 621 (1881), and Draper v. U.S., 164 U.S. 240 (1896), the Supreme Court held that the federal government lacked jurisdiction over offenses by non-Indians against non-Indians in Indian country.

These cases rest on a seldom-used legal argument about the equality of the states of the Union, and on a conceptual distinction between Article 1, Section 8, Clause 17 of the Constitution, the exclusive federal jurisdiction over Arsenals and Dockyards clause, and Article IV, Section 3, Clause 2, the Public Lands clause. The federal government held title to the Indian reservations in question under the Public Lands clause. This conclusion was a result of the lack of state cessions of jurisdiction over Indian reservations, in the admission acts of any of the states; such cessions are required under the Arsenals and Dockyards clause.[18]

The rule applicable to public domain is stated in Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930):

> "Unless there is a later and affirmative cession of jurisidction by the State, the reservation is a part of her territory and within the field of operation of her laws, save that they can have no operation which would impair the effective use of the reservation for the purposes for which it is maintained."

The conclusion drawn was that the states, rather than the federal government, exercised criminal jurisdiction over non-Indian offenses with non-Indian victims within Indian reservations.[19] In dicta in Surplus Trading Co., supra., this was indicated in the following passage:

> "Such (usual Indian) reservations are part of the State within which they lie, and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." 281 U.S. 647, 651.

The test stated in Surplus Trading Co. is that state jurisdiction is allowed unless it operates to impair the effective use of the reservation for the purposes for which it is maintained. It is apparent that, in McBratney and Draper, supra., the Court was going on the premise that state jurisdiction over white intra-racial offenses did nothing to impair the effective use of Indian reservations for the benefit of Indians. In McBratney, the Court stated that:

> "The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians." 104 U.S. 621, 624.

This premise is made explicit in Williams v. Lee, 256 U.S. 930 (1956)[19a] in which Mr. Justice Black analyzed the Indian tribal-state allocation of

governmental power in terms of whether state laws impaired the right of Indians to make their own laws and be governed by them. The opinion expressly indicated that non-Indian intra-racial criminal behavior did not have any impact upon the Indians' right to make their own laws and be governed by them. See Section 1, Note 32, in which the potential impact of non-Indian intra-racial criminal behavior is discussed. See also U.S. ex rel Ray v. Martin, 326 U.S. 261 (1946).

In contrast to the racial separation of police powers within Indian country, the rules for offenses committed outside Indian country recognize no racial distinctions for jurisdictional purposes. The states and the federal government have jurisdiction of offenses, without regard to race. The definition of what territory constitutes Indian country is therefore an important variable to be included in the discussion of criminal jurisdiction.

Indian country was defined on a metes and bounds basis in the earliest Indian Acts,[20] but by 1834, changes in Indian boundaries brought about by the adoption of the program of removal westward,[21] and an increased number of treaties establishing boundaries led Congress to adopt a general definition. This definition included all lands west of the Mississippi, not included within the states, and it further included all lands with states, to which the original Indian title had not been extinguished.[22] This definition was omitted from the Revised Statutes of both 1874 and 1878, but was read back into the statutory scheme by

the Supreme Court in Ex Parte Crow Dog, 109 U.S. 556 (1883). The Supreme Court in the Crow Dog case also held that the definition of Indian country could be modified by the court to take into account changes in the Indians' circumstances, from time to time.

Questions subsequently considered by the Court included whether an executive order or statutory reservation not previously occupied by Indians, who therefore lacked aboriginal title[23] was Indian country,[24] whether lands owned in fee by Indian tribes, but subject to federal restrictions on alienation were Indian country,[25] whether lands purchased by the federal government for the use of Indians as an agricultural colony were Indian country,[26] whether lands allotted in trust or restricted status to individual Indians were Indian country,[27] and whether lands owned in fee title status by non-Indians within Indian reservations were Indian country.[28] The Court held each of these areas to be Indian country.[29]

The Supreme Court definitions of Indian country proceeded upon several different premises as to the source of federal power over Indians, basing it alternately on the Public Lands clause,[30] or on the duty of the United States to protect its wards, under Indian commerce.[31] This has left some doubt about the extent and limits of federal power to declare areas to be Indian country. In 1948, these different sources of power were used by the Congress in the first statutory definition of Indian country since the Indian Intercourse Act of 1834. This definition includes all Indian reservations and allotments, and dependent Indian communities

under the protection of the United States. See 18 U.S.C. Section 1151, p. 9, Section 1, infra, for text.

Congressional power based on land title is utilized in paragraphs "a" and "c", while Congressional power over Indian wards is used with reference to fee lands within reservations, paragraph "a", rights-of-way through Indian reservations, paragraph "c", and dependent Indian communities, paragraph "b". Federal power over Indian country under paragraph 1, dependent Indian communities, is based on the principle that the federal government offers services and protections to an identifiable Indian group, with some form of land title subject to federal protection. Thus, the land must be held by the Indians, or the federal government, or entirely surrounded by land held in trust status for the Indians by the federal government, before the definition of Indian country may be extended to it.[31a]

This history of the territorial principle of the division of jurisdiction is incomplete without reference to the impact of the General Allotment Act,[32] and the railroad land grants,[33] on Indian country. The definition of Indian country established by the 1834 Act, and subsequent definitions, presupposed contiguous tracts of land. The effect of the General Allotment Act, and of establishment of Indian reservations in areas in which the railroads or their grantees held lands, has been to fragment the areas which could be called Indian country. Alternate sections in these areas may be Indian country, or fee land. When jurisdiction is dependent upon land title, extraordinary law enforcement problems can arise.[33] The Supreme

Court has stated, in its latest opinion on the definition of Indian country, that Indian law enforcement officers should not be required to carry tract books, as to land title, in their autos.[34] This situation, however, may still exist in many areas which are the fragmented "remains" of the allotment policy, or of the establishment of reservations or allotments in areas of railroad land grants. This situation is a result of the legal conclusion that the powers of the various governments are strictly territorial. Implicit also is the conclusion that Indian inter-racial behavior can have an impact on Indian tribes when it occurs in one place, and not in another. Thus, the principle of territoriality of criminal jurisdiction exists as a limit on the premises that intra-racial behavior is to be regulated by each race, and adds yet a third variable to the allocation of jurisdiction. Race, offense and locus thus are all intertwined together in any case in which the allocation of criminal jurisdiction in Indian country may be in question.

In the assessment of the benefits and detriments of the present allocation of criminal jurisdiction in Indian country, the present validity of the historical premises underlying this division will be assessed. Possible changes in the present division will be discussed in the light of present validity of these premises.

NOTES

1. This discussion will omit references to the principles reflected in the termination policy followed in the 1940's and 1950's, and reflected in 18 U.S.C., Sections 1362 and 1367, and 25 U.S.C., Section 1361, et seq. Termination will be discussed below as a possible alternative in the form of state assumption of all criminal jurisdiction in Indian country, to the present allocations of jurisdiction.

2. See "Origins of the Allocation of Criminal Jurisdiction in Indian Country," Section I.

3. See, Ex Parte Crow Dog, 109 U.S. 556, 571 (1883).

4. See, 23rd Cong. 1st Sess. H. Pret. #474, Committee on Indian Affairs, May 20, 1834, p. 13, which erroneously states the Act applies criminal laws to Indian v. Indian offenses.

5. Act of June 30, 1834, 4 Stat. 735.

6. 4 Stat. 729.

7. This act failed to pass, III Kent's Commentaries, 400 (11 ed. 1867).

8. See III Kent's Commentaries, pp. 382-383.

8a. Id, pp. 399-400.

8b. See, e.g. U. S. v. Kagama, 118 U.S. 375 (1886).

8c. See, Davis, Criminal Jurisdiction over Indian Country in Arizona, 1 Ariz. L.Rev. 62, 95-101. C.f. "Justice", 1961 U. S. Commission on Civil Rights Report, No. 5, Sec. VII.

9. See the Indian Civil Rights Act, 25 U.S.C., Section 1301, et seq., Pub. L. 90-284.

10. See Note 4, supra.

11. Another possible basis for the assumption of jurisdiction was that regulation of non-Indian behavior was thought to be beyond Indian capabilities, and essential to federal schemes of rapid assimilation of Indians. See, e.g., the Indian Intercourse Act of 1834, 4 Stat. 729, which has extensive provisions allowing regulation of the presence of non-Indian traders and travelers.

12. Miller, Criminal Law, Section 185, pp. 532-533; Anderson, IV Wharton's Criminal Law and Procedure, Section 1501.

13. See 22 C.J.S. "Criminal Law" Sections 11-17.

14. 22 C.J.S. "Criminal Law Section 1(b); 21 Am. Jur. 2d "Criminal Law" Section 1.

15. This conclusion is made on the basis of language in Section 25 of the Act of June 30, 1834. The conclusion is not followed as to states. See Section I, State Jurisdiction.

16. See H. Rep. No. 474, 23rd Cong., 1st Sess., supra, Note 4.

17. U.S. v. McBratney, 104 U.S. 621 (1881).

18. See e.g., Humble Pipe Line Co. v. Waggonner, 376 U.S. 369 (1964).

19. See Utah Light & Power Co. v. U.S., 243 U.S. 389, 404 (1919). This conclusion extends only to offenses for which federal jurisdiction exists under the Public Lands clause, Art. IV, Section 3, Par. 2. It does not extend, for example, to commerce-related offenses, or other offenses for which federal jurisdiction exists, is not based on special maritime or territorial jurisdiction.

20. Cohen, Federal Indian Law, pp. 5-6.

21. The major Removal legislation is at 4 Stat. 411, Act of May 28, 1930. See Cohen, Federal Indian Law, pp. 12-13, 53-62, 72; Foreman, Indian Removal, U. of Okla. Press, Norman, Okla. 1932.

22. Section 1, Act of June 30, 1834, 23rd Cong. 1st Sess. Ch. 161, 4 Stat. 729.

23. Aboriginal Indian title, or the possessory interest held by Indian tribes by virtue of long-continued, uninterrupted, and exclusive possession of lands, is ably discussed by Cohen, in an article entitled "Original Indian Title" at 1947 Minn. L.Rev. 28 et seq. Aboriginal title was the basis for the 1834 definition of "Indian country."

24. Donnelly v. U.S, 228 U.S. 243 (1913).

25. U.S. v. Sandoval, 231 U.S. 28 (1913).

26. U.S. v. McGowan, 302 U.S. 535 (1938).

27. U.S. v. Pelican, 232 U.S. 442 (1914); Hallowell v. U.S., 221 U.S. 317 (1911); U.S. v. Ramsey, 271 U.S. 467 (1921).

28. Seymour v. Superintendent, 368 U.S. 351 (1962); Hilderbrand v. Taylor, 327 F.2d 205 (CA 10 1964).

29. Donnelly v. U.S., supra., Note 24; U.S. v. Celestine, 215 U.S. 278 (1909).

30. U.S. v. McGowan, supra., Note 26; U.S. v. Sandoval, supra., Note 25.

31. See U.S. v. Sandoval, supra., Note 25; U.S. v. Kagama, supra., Note 8b.

31a. See U.S. v. Martine, 442 F.2d 1022 (CA 10 1971).

32. 24 Stat. 288, Act of February 8, 1887.

33. Gates, History of Public Land Law Development, Pub. Land Law Review Comm., 1958.

34. See the discussion of detrimental aspects of the allocation of criminal jurisdiction in "Indian country" infra.

35. Seymour v. Superintendent, supra., Note 28.

THE ALLOCATION OF CRIMINAL JURISDICTION IN INDIAN COUNTRY — BENEFITS

The premises supporting the present division of criminal jurisdiction in Indian country were fully developed by the 1880's. At this time, many reservations may have been wild and foreboding places. The Indian wars were of living memory, and sporadic conflicts still occurred.[1] The federal government asserted extensive rights of control over the presence of non-Indians in Indian country.[2] Indian tribal police had not yet been utilized by Indian Agents, and law and order among the Indians likely bore little formal resemblance to the white man's law and order.[3]

The practical benefits of the tripartite allocation of jurisdiction may have been clear at the time the allocation was established. Indians who were unfamiliar with non-Indians customs and laws should be subject only to Indians' laws, for all but the major crimes. Non-Indians, largely unfamiliar with Indian customary law and justice, should likewise not be subject to the tribes' rules and punishments. Offenses which involved both races were to be allocated to the federal courts, as the federal government could aid in law enforcement when non-Indians were offenders, and as Indian tribes might be lenient with Indians committing offenses against non-Indians. States' rights to exercise the police power were not to be limited on the basis of the occurrence of a crime involving only non-Indians in Indian country, because there was not sufficient inter-racial contact among Indians and non-Indians to justify the conclusion that non-Indian behavior would have an impact upon Indians.

The rules established by the 1880's have remained, with the exception of complete or partial assumptions of state jurisdiction over Indian country in several states,[4] the rules governing the allocation of criminal jurisdiction in Indian country. The continued use of these rules and premises, both by Congress[5] and the courts[6] indicates that the present tripartite division may have beneficial effects which are more important than the problems of ineffective resource use and confusion caused by the multiplicity of jurisdictions. Research for these possible beneficial effects will involve an analysis of the present validity of the historical justifications for the allocation, and an attempt to discover other possible present day benefits derived from the allocation among three governments.

INDIAN TRIBAL JURISDICTION.

The historical justifications for Indian tribal jurisdiction over offenses by Indians against the person or property of other Indians were that it would be unfair to measure Indian intra-racial behavior by alien and different white man's standards, and that the Indian tribes, as quasi-sovereigns, had and should be allowed to exercise the power to regulate the behavior of their members.[7] With the exceptions of the termination and state jurisdiction acts, Congress has chosen consistently to recognize and leave unimpaired this aspect of tribal sovereignity.[8]

These historical justifications for Indian tribal criminal jurisdiction received clear expression in Ex Parte Crow Dog, 109 U.S. 556 (1883).

The opinion states, with reference to a treaty provision to the effect that Congress would secure to the Sioux tribe an orderly government by appropriate legislation, that:

> The pledge to secure to these people***an orderly government***necessarily implies that among the arts of civilized life, which was the very purpose of all these arrangements to introduce among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. 109 U.S. 556, 568.

The statement of the other justification for Indian tribal jurisdiction made in Crow Dog, 109 U.S. 556, at 571, see Section II, p.20, supra., is to the effect that federal criminal law could not be extended by inference over the members of a community for which the law was not made, and which was separated by race, tradition and culture from the government and laws of the United States.

The historical justifications for Indian tribal jurisdiction have continued and current validity, in the light of Supreme Court decisions and Congressional enactments. The Congress has explicitly recognized Indian tribal rights of self-government in the Indian Reorganization Act of 1934,[9] and the Indian Civil Rights Act of 1968.[10] The fact that both of these Acts involved a reshaping of Indian tribal governments, or imposition of limitations on the exercise of powers of self-government, should not obscure the fact that the rights of Indian tribes to make their own laws and be governed by them have received explicit statutory recognition, and protection. The statutory policies of termination embodied in the allotment acts[11] and the termination legislation of the 1950's[12] have been rejected. The

Supreme Court has recognized Congressional protection of Indian tribal rights of self-government,[13] and reaffirmed the right of self-government[14] in several recent cases.[15]

In the 1971 United States Budget Appendix, p. 544, the figures for number of crimes reported to the Bureau of Indian AFfairs indicate that the vast majority of complaints are within present tribal jurisdiction.[16] Tribal law enforcement activities involve tribal members as policemen, prosecutors and judges. The law enforcement process of Indian tribes may be responsive to unique circumstances and customs of Indian tribal members. To the extent that Indian tribal members adhere to and follow unique customs, and to the extent that they have problems arising from their status or circumstances as Indians, the original justifications offered for Indian tribal jurisdiction,(that the Indian tribes could properly consider and apply unique customs), also retains present validity. Indian legislators, policemen and judges would be in a position to interpret and apply their tribal cultural values, morals and laws. Criminal sanctions are punitive and nothing else unless they are supported by cultural values sustaining obedience. Indian cultural values governing Indian behavior may be inconsistent with anglo laws; application of anglo law in these circumstances could amount to little more than a penalty for being Indian. Problems of enforcement, and of tension in Indian-white relations, perhaps less significant today than in 1880, loom large.

Doubt is cast on the present validity of the cultural differences among Indians and non-Indians as a justification for Indian criminal jurisdiction

by two cases decided by the Ninth Circuit Court of Appeals, Colliflower v. Garland[17] and Settler v. Yakima Tribal Council.[18] These cases hold that Indian tribal courts are federal agencies, within the meaning of the federal habeas corpus act. In Settler, the court looked to the facts that consent of the federal government to modifications of the Yakima Tribe's law and order code was required before modifications could be made, that the Yakima Tribal law and order code was almost a verbatim copy of the Secretary of the Interior's law and order code, 25 C.F.R. Part 11, and that the Yakima Tribal Court lacked authority to hold an enactment of the Tribal council, approved by the Secretary of the Interior, unconstitutional, to justify the holding that the Tribal court was a federal agency.

The Secretary of Interior and the Bureau of Indian Affairs assert broad powers to regulate Indian tribal exercises of the right to self-government.[19] The opinion in Settler correctly points out that most Indian tribal law and order codes are copies of the Secretary's code.[20] The Secretary retains a veto power over many Tribal council resolutions.[21] The result of these controls is that Indian tribal codes may not reflect Indian customs or values so much as they reflect the Secretary of Interior's. Punishments for morals offenses are one area where there may be wide divergence between Indian beliefs and Indian laws, copied from 25 C.F.R.

The extent of Secretarial authority, however, does not impair present justification for the criminal jurisdiction of Indian tribes. Settler is subject to the criticism that the judgments of Indian tribal courts

are not subject to review by the Secretary of Interior or the Bureau of Indian Affairs. The agencies sought to have such review included in the Indian Civil Rights Act of 1968[22] but Congress refused. Further, Settler[23] is inconsistent with the 1968 Act. The rights guaranteed individuals under the Act exist when the tribe is exercising powers of self-government. If the Settler rationale that the Yakima Tribal court is exercising delegated authority of the Bureau of Indian Affairs and the Secretary of Interior applies, then the tribal court is not within the scope of the Indian Civil Rights Act. Under the Settler view, the full panoply of the Bill of Rights and the Constitution applies to the tribal courts, while Congress, in the 1968 Act, clearly intended that several of the provisions of the Bill of Rights should not apply to Indian tribes.[24] Settler also fails to note that the Secretary of Interior has justified the scope of authority over Indian tribal exercises of the right of self-government on the basis of grants of authority from the Indian tribes.[25]

Despite Secretarial powers, there remain spheres in the criminal justice process in which unique circumstances and customs of Indians can be accommodated by the tribes and their law enforcement personnel. Decisions, for example, as to arrest, as to filing of charges, as to defenses to criminal liability arising from Indian customs, as to punishment, probation and parole, all may involve discretion exercised by officers of Indian tribes, which can be exercised in the light of the beliefs and customs of the people.

Additionally, there are reasons for the end of Secretarial approval powers over tribal council or business council ordinances. The protections for individuals which these powers may have provided[26] are now available through the Indian Civil Rights Act. If such approval powers are justified on the grounds of tribal grants of authority, repeal of both the authority, and enactment of law and order codes which reflect Indian values is possible without Secretarial approval.

FEDERAL JURISDICTION

The historical premises underlying federal jurisdiction over crimes in Indian country are the protection of Indians, when offenses involvin Indian victims are prosecuted, and when non-Indian offenders or victims are involved, that the Indian tribal customary laws and enforcement mechanisms might be inapplicable to non-Indians, unknown to them, or unduly severe. Fear of excessive leniency by Indian tribes for Indian offenders with non-Indian victims may also have served as a justification, through concurrent jurisdiction over Indian v. non-Indian offenses[27] lessens the impact of this potential justification.

Under the Major Crimes Act, 18 U.S.C., Section 1153, the federal government has jurisdiction over enumerated offenses, to the exclusion of both state and tribal jurisdiction.[28] Congressional and public outrage at the Crow Dog decision may have prompted the exception to the rule establishing tribal jurisdiction over offenses involving Indians only. The justification for federal jurisdiction, as opposed to state

jurisdiction, was stated in U.S. v. Kagama,[29] to the effect that potential for discrimination in state trials existed. In "Justice", vol. 5 of the 1961 Report of the United States Commission on Civil Rights, the Commission indicates that limited hearings on the question of denial of civil rights of Indians produced widespread and uniform complaints from many different Indian groups, about discrimination against Indians practiced by law enforcement officials in towns and counties bordering or near Indian reservations. Complaints were raised that non-Indian law enforcement officials inadequately served Indian communities, when the officials had a duty to provide law and order services.[30] Complaints about lack of services and discriminatory treatment of Indian offenders have been made in states which have accepted criminal jurisdiction over Indians in Indian country.[31] To the extent that these complaints of discrimination are valid,[32] federal jurisdiction over Indian v. Indian offenses is justified. Federal courts generally draw jurors from larger areas than state courts, thereby reducing the possibility of juror prejudices against Indian defendants. Places of trial may also be distant from the boundaries of reservations, and from nearby towns in which prejudice may be strongest.

Federal jurisdiction has also be justified on the grounds of protection given Indians in federal courts.[33] To the extent that Federal Criminal Procedure rules, and the Federal Rules of Appellate Procedure are more liberal in trial procedures or appellate procedures and the scope of appellate review than are state procedures, this justification also

retains present validity. Federal District Court judges may also exercise discretion in sentencing, to take into account any unique circumstances arising in any criminal transactions, because Indians are involved.[34]

Federal jurisdiction over offenses involving non-Indians either as offender or victim, with an Indian as the other party, is presently justifiable only to the extent that Indian tribes are limited in the sentences imposable, generally, and to the extent that Indian tribes may not be wealthy enough to maintain courts and law enforcement systems.[35] If an Indian offender is involved with a non-Indian victim, and the offense is not one of the major crimes, the Indian tribe has concurrent jurisdiction, and no federal prosecution is possible if the offender has been found guilty and punished.[36] Additionally, those Indian tribes which have established courts and law and order systems, and which are dealing with offenses similar to off-reservation systems, are dealing with offenses similar to those normally prosecuted in municipal and lesser state courts. The Indian Civil Rights Act provides remedies, and rights, for offenders charged in tribal courts which may not be available to offenders in other court systems, which deal with the same grade of misdemeanor offenses.[37] Non-Indian offenders committing petty offenses may now escape prosecution entirely, because federal authorities are not able or willing to prosecute petty offenses.[38]

STATE JURISDICTION

Historical justification for state criminal jurisdiction over offenses by non-Indians against non-Indians are intertwined with legal theories about federal power over enclaves and broad original state jurisdiction over citizens and other persons within their territorial limits. The basis of state jurisdiction is the state's police power. However, while the purposes of federal reservations for Indians were held to sustain exclusive federal jurisdiction over offenses involving Indians as offenders or victims, the Supreme Court held that non-Indian intra-racial offenses within reservations did not have enough impact upon Indians to sustain federal preclusion of state jurisdiction.[39] When this rule was established perhaps a few non-Indians were resident in Indian country; then, the Commissioner of Indian Affairs and local Indian Agents had wide powers for removal of non-Indians,[40] and their reservations were remote. The conclusion about the impact of non-Indian inter-racial behavior may have had validity because this behavior likely had no or little impact on reservation Indians. Today, reservations are generally more open to non-Indians. Some Indian tribes actively encourage tourism. Provisions for removal of non-Indians from reservations were repealed in 1934.[41] Circumstances are more likely to arise in which non-Indian inter-racial behavior will have an impact on reservation Indians.[42] More importantly, non-Indian offenses without victims have generally been thought to be within state jurisdiction. Non-Indian traffic offenders may certainly have an impact on reservation Indians.[43]

In the most recent Supreme Court case on non-Indian intra-racial offenses, State ex rel. Ray v. Martin, the Court states that it makes little difference whether the states or the federal government assume jurisdiction over offenses. State jurisdiction over non-Indian traffic offenders may be beneficial if the Indian reservation lacks law enforcement personnel, or if a major highway runs through an Indian reservation. Otherwise, state criminal jurisdiction seems to lack substantial justification.

NOTES

1. Reports of the Secretary of Interior, 1885, pp. 1-6; 1891, pp. 82-55.

2. See R.S. 2147-2150.

3. See Hagen, Indian Police and Judges.

4. See 18 U.S.C. Section 1162, 28 U.S.C. Section 1360, Act of August 15, 1953, 67 Stat. 588, as amended by 25 U.S.C. Sections 1321-1327, Act of April 11, 1968, 82 Stat. 77.

5. 18 U.S.C. Chapter 11.

6. Cases are digested to the topic "Indians" Key No. 38(2), in the West Digest System.

7. See Section II.

8. But, c.f., Act of April 11, 1968. 82 Stat. 77, 25 U.S.C. Section 1301 et seq.; Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343 (1969).

9. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. Sections 461 et seq.

10. Act of April 11, 1968, 82 Stat. 77.

11. See the General Allotment Act, Act of February 8, 1887, 24 Stat. 388; Cohen, Handbook of Federal Indian Law, pp. 206-212.

12. Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162.

13. Kennerly v. District Court of Ninth Judicial District of Montana, 400 U.S. 423, 27 L.Ed.2d, 507, 91 S. Ct. 480 (1971).

14. For definitions of the scope and extent of the rights of Tribal self-government, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Williams v. Lee, 358 U.S. 217, 3 L.Ed.2d 251 (1959); Cohen, Handbook of Federal Indian Law, pp. 122 et seq. has the most extensive and well developed discussion.

15. Williams v. Lee, supra, note 14; Organized Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed.2d 573 (1962).

16. The Budget of the United States, 1971, Appendix, p. 544.

17. 342 F.2d 369 (CA 9 1965).

18. 419 F.2d 486 (CA 9 1969), cert. den. 398 U.S. 903.

19. See Note, The Indian Bill of Rights***, supra, note 8, at p. 1350; Price, Lawyers on the Reservation:Some Implications for the Legal Profession, reprinted in "Toward Economic Development for Native American Communities" Joint Economic Committee, Congress of the United States, 91st Cong. 1st. Sess. vol. 1, 191, 191-193. See also, 25 C.F.R. passim.

20. See, e.g. Title 17, Navajo Tribal Code (1969 Ed.), and compare, 25 C.F.R. This practice reached the ridiculous when the Navajo Tribe, by Resolution CJA-1-59 adopted sections of 25 C.F.R. Part 11 as the Navajo Tribe's criminal code, by the section number given the sections in 25 C.F.R. The Bureau of Indian Affairs withheld approval of the Resolution, and required that the text of the sections be set out in the Resolution before the Navajo Tribe could adopt its own criminal code.

21. Price,supra, note 19, p. 192; Justice V Report of the United States Commission on Civil Rights, 1961, pp. 126-127.

22. See Reiblich, Indian Rights Under the Civil Rights Act of 1968, 10 Ariz.L.Rev. 616,633-636 (1968).

23. See 25 U.S.C. Section 1302.

24. Absent from the 1968 Act are the prohibitions against establishment of religion, the second and third amendments, the right to trial by an impartial jury of the district, and the right to appointed counsel.

25. See Justice, supra, note 21, pp. 126-127.

26. The scope of jurisdiction of Federal District Courts under the 1968 Act is very confused at the present, as three Federal District Courts have reached antagonistic results on jurisdiction under the Act. Compare Dodge v. Nakai, 298 F.Supp. 19 (DC Ariz. 1969), with Pinnow v. Shoshone Tribal Council, 314 F.Supp. 1157 (DC Wyo. 1970), and Spotted Eagle v. Blackfeet Tribe of Blackfeet Ind. Res., 301 F.Supp. 85 (DC Mont. 1969). Pinnow allows jurisdiction only under 25 U.S.C. Section 1303, habeas corpus; Spotted Eagle requires that jurisdiction be against the Tribe only, and that pendent jurisdiction exist as to Tribal officials; Dodge allows jurisdiction against officials of the Tribe, without joinder of the Tribe, and any action under any claim of denial of rights granted by the Act, under 28 U.S.C. Section 1343(4), relating to civil rights.

27. See 18 U.S.C. Section 1152. The jurisdiction is concurrent in the sense that either the Tribe or the Federal government may exercise it in the first instance, but actual punishment of the offender by the Tribe is required before Federal jurisdiction is excluded.

28. See Section I, notes 16, 17.

29. 118 U.S. 375 (1886).

30. Justice, supra, note 21, at pp. 146-148.

31. Report of the California Commission on Indian Affairs, 1963.

32. See, e.g. United States ex.rel. Curley v. Gonzales, Misc. Nos. 8372-3, DC NM, and the discussion in Moore, Prisoners are People, 10 Natural Resources J. 869 (1970). In Curley, an injunction was issued, prohibiting the City of Gallup, New Mexico from housing more than 60 prisoners in its city jail. Prisoners consisted mainly of Navajo Indians, arrested in Gallup. The crisis in prisoner population arose when a Gallup Magistrate began sentencing all Navajos arrested for drunkeness to the jail for 90 days; the Federal District Court found that the jail conditions constituted a cruel and unusual punishment.

33. U.S. v. Kagama, 118 U.S. 375 (1886).

34. One instance of a reduced sentence for a Navajo convicted of murder, because the Navajo believed the victim to be a witch, is reported in Young, Navajo Tales, Bureau of Indian Affairs.

35. See Section IV, infra.

36. 18 U.S.C. Section 1152, U.S. v. LaPlant, 156 F.Supp. 660 (DC Mont. 1958). This case gives some idea of the potential confusion inherent in the complexities of jurisdiction over crimes and criminals in Indian country.

37. See 25 U.S.C. Section 1302(7), which limits tribal punishments to six months imprisonment and a $500.00 fine.

38. Davis, Criminal Jurisdiction over Indian Country in Arizona, 1. Ariz.L.Rev. 62, 72-73.

39. See Section I, note 32; Section II, pp. 23-26.

40. R.S. 2147-2150.

41. Act of May 21, 1934, 48 Stat. 787.

42. See, e.g. Davis v. Littell, 398 F.2d 83 (CA 9 1968). This case was a slander action brought by Davis, see note 38 supra, against Norman Littell, the Navajo Tribe's General Counsel at the time of the alleged slander. The words were spoken to the Navajo Tribal Council while it was in session. Disturbances in legislative chambers,

sometimes involving violence, are not unknown, and if one were to occur in the Navajo Tribal Council Chambers, between two non-Indians, we are faced with the astonishing conclusion under the present rules allocating criminal jurisdiction in Indian country, that the State of Arizona legislature, police and courts would have criminal jurisdiction over the disturbance, and that the Navajo Tribe would lack jurisdiction over the two non-Indians, while they were in Navajo Tribal Council Chambers!

43. See Section I, note 32. See also Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966), which involved an auto accident and death, when a car driven by a non-Indian in Indian country struck a car driven by an Indian.

THE ALLOCATION OF CRIMINAL JURISDICTION IN INDIAN COUNTRY - DISADVANTAGES

"Benefits" arising from the present allocation of criminal jursidiction in Indian country come from the presence of tribal, federal or state law enforcement systems. The fact that three governments are required to participate in law enforcement in Indian country results in no beneficial effects. By contrast, there are substantial disadvantages arising from the requirement that three different governments participate in law enforcement activity. These disadvantages include confusion for law enforcement officers, lawyers and judges, arising from the complexity of the allocation; the existence of grey areas in which the allocation is uncertain; and duplication of law enforcement efforts. Disadvantages also arise in connection with participation by each of the three governments in law enforcement. These generally are traceable to financial difficulties of law enforcement systems, and to the limited role given each government under the present allocation. The general disadvantages and the disadvantages specifically associated with each of the governments will be discussed separately.

GENERAL DISADVANTAGES

A. Confusion. Sources of confusion and hesitation for law enforcement officers abound in Indian country, when jurisdictional problems are presented. Application of the rules governing jurisdiction may prove difficult in multi-racial offenses, difficult in cases in which the race of the offender or victim is unclear or unknown, and difficult

for courts and lawyers because complex legal problems arise easily. An additional source of confusion in some areas of fragmented land ownership patterns is that territorial jurisdiction is as fragmented as land titles; small tracts of Indian country and non-Indian country may occur in rapid succession.

Transactions which involve criminal actions by persons of different races pose special problems for law enforcement officers. If, for example, an Indian tribal policeman discovers both Indian and non-Indians drinking in the same automobile, he may lack authority to arrest the non-Indians.[1]

Race is one of the major tests for allocating jurisdiction in Indian country. Classifications based on race have been held unconstitutionally vague.[2] The problem may be alleviated in Indian country because membership rolls for Indian tribes may give a clear indication of race.[3] However, physical characteristics may be misleading, or not indicative of race, and the officer in the field may have little more than physical characteristics to rely upon. Jurisdiction also shifts on the basis of the race of the victim, and in cases of offenses against property, the officer would seem to have no basis for determining jurisdiction unless he is aware of the owner's race. While the judicious policeman witnessing a burglary might make initial inquiry about the race of the offender, and of the owner, more likely officers will proceed to make an arrest. The use of racial tests places the burden of proper jurisdictional

decision on the officer himself, when determinations of race may not be possible until arrest and confinement have already occurred.

The relative simplicity of statements of the rules governing jurisdiction in Indian country may lead to nightmares of application. In Petition of Carmen, 168 F.Supp. 942 (DC Cal. 1958), the opinion discloses that state proceedings involving Carmen included two trials, and seven appellate opinions or orders. Federal proceedings involved Carmen's successful petition for habeas corpus, an appeal to the Ninth Circuit, and two petitions to the Supreme Court. The issue litigated was whether California, or the federal government had exclusive jurisdiction to prosecute Carmen for homicide.

Perhaps more important than judicial problems arising from application of the rules governing allocation of jurisdiction are police problems. Events disclosed in the recent case of Chavez v. Bigman, No. 8307, U.S. District Court for the District of New Mexico,[4] illustrate the policeman's plight in Indian country. Bigman and Navajo Tribal policemen raided a drinking party in the Crownpoint, New Mexico Bureau of Indian Affairs boarding school. Chavez, a Navajo minor, was drinking. The Navajo Tribal Code prohibits possession of liquor on lands subject to the jurisdiction of the Navajo Tribe.[5] Federal law prohibits possession of intoxicating beverages in B.I.A. school dormitories.[6] State law prohibits possession of liquor by persons underage.[7] Tribal officers were present; Bigman was both a federal officer and a county deputy sheriff. Bigman chose state law, and Chavez was arrested and delivered

in a Navajo Tribal police vehicle to state authorities in Gallup, New Mexico. The choice of jurisdiction involves such legal questions as whether the dormitory was within the lands subject to the jurisdiction of the Navajo Tribe, whether the federal act precluded exercise of tribal power, whether the federal act precluded state exercise of power, and whether the land upon which the dormitory was located was reservation land, or Indian country.

Special problems exist for officers serving in "checkerboard" areas. These areas are made of small tracts of Indian country interspersed among tracts of non-Indian country. The Supreme Court, in Seymour v. Superintendent,[8] indicated that in areas with "an impractical pattern of checkerboard jurisdiction" law enforcement officers operating in the area will find it necessary to search tract books in order to determine...criminal jurisdiction over each particular offense."[9] Jurisdiction changes as land title changes, and the problem becomes acute when highways pass through such areas.

B. Grey Areas. Jurisdiction over offenses with victims, including offenses against property, is tolerably stated by the rules allocating criminal jurisdiction in Indian country.[10] Allocation of jurisdiction in terms of the races of both the offender and the victim has been a policy from the days of early federal statutes.[11] These rules, however, fail to provide adequate guidelines for allocation of jurisdiction over the class of crimes termed "offenses without victims". Some offenses

of this type, including driving while intoxicated and other traffic offenses, and disorderly conduct, may pose threats of injury to members of the surrounding community; the prevention of offenses of this type may be a matter of importance for law officers and for the community. However, federal statutes have not been directed to jurisdiction over offenses without victims, and jurisdiction over such offenses has rarely been the subject of adjudication.[12]

The allocation now generally followed, except in states which possess jurisdiction over Indians pursuant to Congressional action, is that states have jurisdiction over offenses without victims by non-Indians and Indian tribes have jurisdiction over such offenses by Indians. It is established that states may not exercise jurisdiction over Indians committing offenses without victims in Indian country.[13] A long held, though not necessarily correct, view supported by the Bureau of Indian Affairs, is that Indian tribes lack jurisdiction over non-Indian offenses without victims. The federal government appears to retain jurisdiction over offenses without victims, though in practice, the jurisdiction is rarely exercised.[14] It has also been stated that the federal government lacks jurisdiction over offenses by non-Indians, when no Indian victims are involved.[15]

This allocation has been reached by analogies drawn to rules relating to offenses with victims. State exercise of jurisdiction over Indians, except where authorized by statute, is contrary to the right of Indians to

make their own laws and be governed by them,[16] and states lack jurisdiction over such offenses because they lack jurisdiction over offenses by Indians in Indian country generally. Offenses involving non-Indian offenders and non-Indian victims have been held within state jurisdiction, and the easy analogy is that offenses without victims committed by non-Indians involve only non-Indians as well, and are therefore within state jurisdiction.[17]

The analogies are by no means compelling. Especially when jurisdiction over traffic offenses or offenses related to intoxication is considered, the policies underlying the allocation of jurisdiction over offenses with victims fail to provide adequate jurisdictional guidelines. Justifications for denying Indian tribes jurisdiction over non-Indian offenders include the refusal to impose perhaps unknown and unexpected standards of behavior on non-Indians, territorial limits of Indian tribal jurisdiction and the possibility of "cruel and unusual" punishments or punishments enhanced for non-Indian offenders. These justifications are of little weight in traffic and intoxication offenses when compared to justifications for Indian tribal assumption of jurisdiction over such offenses. The justifications for holding non-Indian offenders committing offenses against non-Indians subject only to state law do not extend to non-Indian traffic offenses, or, for example, non-Indian offenses involving wildlife and fish resources on Indian reservations. As the Indian population in Indian country usually exceeds non-Indian population, likelihood of injury to an Indian resulting from

traffic offenses is greater than likelihood of injury to non-Indians. Likewise, fish and wildlife resources may be valuable both as food sources and sources of recreation-based tribal income. In neither case are the Indian tribes and their members "unaffected" in the sense that no Indians are involved in the transactions.[18] Likewise, where large numbers of non-Indians traverse reservation roads, dangers posed to non-Indians by Indians disobeying traffic laws might outweigh Indian tribal rights of self-government, especially when Indians do not actively police the roadways.

For an able discussion of the problems posed by lack of adequate statutory or decisional law in the area of offenses without victims, see Davis, Criminal Jurisdiction in Indian Country in Arizona, 1 Arizona Law Review, p. 62 et seq.

C. Duplication of Law Enforcement Efforts. Especially when jurisdiction over traffic offenses is split between state and tribal governments, duplication in law enforcement efforts occurs. It takes two policemen, one state and one tribal, to patrol highways. Were jurisdiction limitations rigidly adhered to, officers from state or federal and tribal governments might be required to stop a disturbance involving members of different races. It makes little sense to say that a policeman serving an Indian tribe may not stop and arrest a non-Indian speeding and driving recklessly on roads in Indian country. Except for limitations discussed below, in the section on difficulties in state jurisdiction,

it also makes little sense to deny the power to arrest an Indian committing the same offense to a state officer present on the scene of the offense.

A result of this required duplication, with participating governments each limited to a sphere of criminal jurisdiction less than adequate for effective law enforcement, is that some jurisdictions simply have stopped or have refused to provide police services. For example, some highways within the Navajo reservation in New Mexico are not state highways, and either as a result of lacking statutory authority or of adequate financial support for law enforcement efforts, highways are patrolled little, if at all, by state officers. A non-Indian drinking while driving is effectively "beyond" any law enforcement; by contrast, if the non-Indian leaves the road right-of-way, he is liable for committing a federal offense.[19]

D. Specific Disadvantages. Under this heading fall the disadvantages attendant to participation, or the lack of participation, in law enforcement activities in Indian country by each of the three governments allocated jurisdiction over criminal offenses and offenders.

(1) Federal Government: The federal government has jurisdiction over major crimes by Indians against Indians in Indian country, over offenses by non-Indians against Indians in Indian country, and over offenses committed by Indians against non-Indians, when the offender has not been punished under tribal law. Federal courts, magistrates and

law enforcement officers are often located distantly from Indian reservations. Distances, difficulties in investigation and extensive caseloads result in the chief complaint raised by Indians against Federal law enforcement officers, that there is simply not enough law enforcement, and too few prosecutions of offenders, to deter or adequately punish criminals.[20] Federal law enforcement officers, other than members of the Law and Order Branch of the Bureau of Indian Affairs, do not generally participate in daily law enforcement activities such as patrols, misdemeanor and traffic offense arrests, and processing of arrestees and prisoners. Indian tribes complain that those who commit the most serious offenses often go unpunished, or receive only the short sentences Indian tribal courts are able to mete out,[21] because jurisdiction is exclusively federal, and no prosecutions occur.

(2) State Governments: State governments often fail to provide adequate law enforcement services in Indian country because the taxes normally available to finance law enforcement services cannot be collected in Indian country.[22] This is an especially difficult problem when services are provided by units of the state, including counties, or municipalities, as these lower governmental units often may derive little income from Indian reservations.[23] Indians may also lack the power of the ballot, to force local units to provide adequate services.

States traditionally have exercised jurisdiction over offenses by Indians committed without Indian country;[24] state jurisdiction has also

been exercised over offenses by and against Indians in those jurisdictions which have been authorized by federal statute to assume such jurisdiction.

State jurisdiction over Indians has a history of exercised discrimination. The 1830's witnessed the destruction of the Cherokee Nation's homeland by Georgia and its citizens, anxious to acquire the gold and farmlands within the Cherokee reservation. The rapacity of the whites and the misery of the tribes of the Southeastern United States in the midst of "Indian Removal" led DeToqueville to predict that the Indians' last respite from forced migrations westward would be the Pacific Ocean, or their graves.[25] By 1886, the Supreme Court commented in holding the Major Crimes Act not to be an intrusion upon reserved state powers, that: "They (the Indians) owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."[26] Local ill feeling, and the history of state assertions of control over Indian tribes, were forces resulting in the extent of federal control and protection of Indians.

Today, the special status of Indians, including tax exemptions and federal services, social problems, cultural and moral differences and problems of poverty have replaced Indian depredations and wars as sources of local ill feeling. There is evidence that discrimination continues today, and this discrimination perhaps is the major difficulty with state exercise of jurisdiction over Indians. The 1961 Report of

the United States Commission on Civil Rights, Justice, Vol. 5, contains an extended discussion of discrimination against Indians in major fields of voting, public education, administration of justice, public welfare, housing, employment and public accommmodations. The Report makes the following assessments of discrimination in the administration of justice:

> For the most part complaints of Indians with respect to law and order go to two extremes. On the one hand the charge is made that law and order is not adequately maintained on Indian reservations; on the other, there are frequent and widespread complaints that law enforcement officials in the white communities with substantial Indian populations, "throw the book" and sometimes more at Indian violators. p. 146.
>
> A complaint which seems to come from all jurisdictions is that the local police officials tend to ignore Indian offenses against Indians but are very severe when Indians become involved with white persons. p. 147.
>
> ***the repetitive nature of the charges emanating from different sources suggests that discrimination in the administration of justice is a serious concern. If true, the charges amount to a substantial denial of civil rights for an important segment of the population. p. 148.

State Commissions or Committees on Indian affairs have agreed with the Civil Rights Commission's assessment.[26] It is important to note that discrimination against Indians may take the form of refusing to enforce the law; this assessment gains likelihood because local governmental units, struggling with expenses of law enforcement, may receive little or no tax income from Indian reservation areas.

(3) Indian Tribes: Problems of Indian tribes in law enforcement are manifold. The lack of monetary and personnel resources, and the lack of "roots" for a judicial system modeled after non-Indian

systems, pose serious difficulties. Indian tribes vary dramatically in their populations, in the territorial area reserved for their use, and in their customs and cultures. Extreme variations also occur in the amount of funds made available for law enforcement systems. Some tribes or bands have no tribal income, while the Navajo tribe of Indians spends in excess of $2,000,000 annually for law enforcement services.[27] These variations make establishment of general approaches to law and order problems of various tribes difficult. Dine' Da Ho Ahgi' (The People Shall Judge), by the National Indian Justice Planning Association, Inc., 1971, provides a complete discussion of problems facing Indian tribal law enforcement systems today.

NOTES:

1. See Section 2, supra.

2. Perez v. Lippold, 32 Cal.2d 711, 189 P.2d 17 (1948).

3. See Cohen, Handbook of Federal Indian Law, chapter 1.

4. Appeal pending, United States Circuit Court of Appeals for the Tenth Circuit.

5. 17 Navajo Tribal Code Section 561.

6. 18 U.S.C. Section 1155.

7. Section 46-10-12, N.M.S.A. 1953 Comp. (Repl. Vol. 7, Supp.).

8. 368 U.S. 351 (1962).

9. Id., at 358.

10. Davis, Criminal Jurisdiction over Indian Country in Arizona, 1. Ariz. L.Rev. 62 (1959).

11. See Act of June 30, 1834.

12. See Davis, supra, note 10.

13. See, e.g. Williams v. Lee, 358 U.S. 217 (1959).

14. See Davis, supra, note 10.

15. Draper v. U.S., 164 U.S. 240 (1896); McBratney v. U.S., 104 U.S. 621 (1881).

16. Williams v. Lee, supra, note 13; Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

17. See Davis, supra, note 10, and cases cited note 15.

18. See, e.g. Davis v. Littell, 398 F.2d 83 (CA 9 1963) cert. den. 393 U.S. 1018. The facts in this case involve actions by a non-Indian in the chambers of the Navajo Tribal Council, while the Council was in session. What if two non-Indians have an altercation in an Indian tribal government office: Can it be said that their behavior would have no impact on Indians? What if one non-Indian commits the crime of armed robbery, taking money from a non-Indian reservation trader, while Indians are present in the store? What if one non-Indian commits arson upon the property of another non-Indian, located within a reservation? These possibilities raise substantial doubt that the Indian customer in the store, or the Indian fireman putting out the arsonist's fire, would agree with the Supreme Court's assertion that non-Indian intra-racial behavior has no impact on Indians.

19. See 18 U.S.C. Section 1154.

20. See Davis, supra, note 10; see also Dine' Da Ho Ahgi', National Indian Justice Planning Association, 1971, p. 170.

21. Davis, supra, note 10.

22. States are generally prohibited from taxing Indian tribal trust lands or assets, and from taxing allotted lands.

23. This is especially so if the tax base for local law enforcement units is primarily ad valorem property taxes. See Tribal Governments and Law and Order, State of Montana, Department of Indian Affairs, p. 19.

24. See Dine' Da Ho Ahgi', supra, note 20, p. 96.

25. Democracy in America, ch. 23.

26. U.S. v. Kagama, 118 U.S. 375 (1886).

27. See Progress Report to the Governor, on Indians in Rural and Reservation Areas, 1966, California State Advisory Commission on Indian Affairs; Report of the Minnesota Indian Affairs Commission, 1967, p. 31. See also, Cohen, Handbook on Federal Indian Law, pp. 151-152, 173-174.

28. See the Budget of the Navajo Tribe of Indians, FY 1971; Agency Law and Order Reports, Arizona, Utah and Nevada for 1969, on file in the offices of the National Indian Justice Planning Association, Inc., Old Post Office Building, Santa Fe, New Mexico.

THE MAJOR CRIMES ACT
18 U.S.C. Section 1153

In 1883, the United States Congress appropriated one thousand dollars for the printing of records, briefs and legal memoranda, and for counsel fees in the case of Ex Parte Crow Dog, opinion reported at 109 U.S. 556 (1883).[1] Perhaps like any other client who pays for a losing case, Congress was outraged at the decision, which held that the United States District Courts lacked jurisdiction to try an Indian for the murder of another Indian in Indian country. In 1885, through the Act of March 3, 1885, 23 Stat. 385, Congress made the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny federal offenses, when committed by one Indian against the person or property of another Indian, within the Indian country. The Act, popularly called the "Major Crimes Act" has since been expanded[2] to include some thirteen offenses, all of which are enumerated in the present 18 U.S.C. Section 1153, which reads as follows:

> "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

> As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed."

This is at best a complicated criminal statute. Two of the offenses, rape and assault with intent to commit rape, are defined in accordance with the law of the state within which the offense occurred, and punishable in the discretion of the judge. Four of the offenses, burglary, assault with a dangerous weapon, assault resulting in serious bodily injury and incest are both defined and punished in accordance with state law. One offense, carnal knowledge, is defined within the text of the section. The remaining offenses, murder, manslaughter, assault with intent to kill, robbery and larceny are defined with reference to the Federal Criminal Code.

This variety of references, in part or in whole, to state law has been a source of problems for both federal prosecutors and for Indian defendants prosecuted under the Major Crimes Act. In Acunia v. U.S., 404 F.2d 140 (CA 9 1968), an Indian was indicted for the purported crime of incest.[3] At the date of the commission of the alleged offense, incest was indeed one of the major crimes. However, the federal criminal code lacked a definition of incest, and the Major Crimes Act provided no reference to state law for definition of the crime. Thus, the federal court was left with the task of defining both the elements of the crime and setting punishment without legislative guidelines. Of course, there is no federal common law of crimes. The indictment was ordered dismissed on the ground that the crime of incest was unenforceable. Drafting indictments in the context of federal and state references may also prove a problem.[4]

Since both 18 U.S.C. Sections 1152 and 1153 apply to crimes committed by Indians against non-Indians, federal prosecutors have had problems determining which statute should serve as the basis for indictment, although it is now generally settled that indictments for crimes included within the Major Crimes Act must be drawn to charge offenses under the Act and that indictments cannot properly be drawn charging offenses included within the Major Crimes Act under 18 U.S.C. 1152.[5]

A discussion of the place of Section 1153 in the federal statutory scheme applicable to Indian country is essential as background for analysis of the other, and more significant, infirmities of the Major Crimes Act. Section 1152 is the general organizing statute for the scheme. It extends the law of the United States relating to places within the general maritime and territorial jurisdiction of the United States to Indian country. This extension includes state law of the locality of the reservation, insofar as this law is not in conflict with applicable federal law or policies, under 18 U.S.C. Section 13, the Assimilative Crimes Act.[6] This extension of federal enclave law is made without regard to the race of the offender or the victim.

Under the present allocation of criminal jurisdiction in Indian country, 1152 applies to offenses by non-Indians against Indians. By an exception contained in the text of 1152, crimes by Indians against the persons or property of other Indians are excluded. This exclusion means that none of the sections establishing crimes for enclaves, including the

Assimilative Crimes Act, apply to Indian intra-racial behavior. One further exception is provided in the case of offenses by Indians against non-Indians, if the Indian is punished according to the law of his tribe. 18 U.S.C. Section 1153, the Major Crimes Act, is an exception to the provision in 1152 exempting Indian intra-racial behavior from the application of federal enclave law. Indians committing any of the enumerated offenses against either an Indian or a non-Indian are subject to federal prosecution and punishment. Thus, non-Indians committing offenses against Indians are subject to prosecution and punishment under 1152, while Indians committing offenses listed in 1153 are subject to prosecution and punishment under that section.

However, while 1152 applies the corpus of federal enclave law to non-Indians, 1153 applies an amalgam of state and federal law, defining offenses and setting punishments, to the Indian offender. Because different laws are applicable to different offenders on the basis of race, several occasions exist in which Indians or non-Indians will be treated differently in terms of punishments, of rights at trial, and of the elements the prosecution is required to prove, simply because they are members of one race or the other. The statutory scheme thus provides a hornet's nest of equal protection problems.

Foremost among these constitutional difficulties is the problem of differing punishments for the same or substantially similar offenses, based solely on the race of the offender or the victim.[7] This problem

will arise when 1153 applies state law establishing punishments for substantially similar offenses by non-Indians. Unless the federal and state punishments are equal, either the Indian or the non-Indian offender will be punished more severely than the other, on the basis of race. Assault with a dangerous weapon is such an offense, in that 18 U.S.C., Section 113 (c) applies to non-Indians in Indian country, while state law definitions and punishments apply to Indians in Indian country. In Arizona, New Mexico, Montana, Washington and Oregon an Indian committing an assault with a dangerous weapon upon another Indian would be subject to more severe punishments than would a non-Indian commttting the same offense against an Indian.[8] In Nevada, Colorado, Idaho and North Dakota the non-Indian would be subject to more severe punishment.[9]

The offenses of burglary, assault resulting in serious bodily injury, and incest are also defined and punished in accordance with state law. There is no comparable federal crime for incest or burglary, but possible duplication exists for the offense of assault resulting in serious bodily injury, and the federal offense of assault by wounding.[10] Thus, problems similar to those posed by the offenses of assault with a dangerous weapon could exist whenever assault resulting in serious bodily injury is charged.

A special problem is posed by the offenses of rape and assault with intent to rape. Penalties provided for rape of an Indian by a non-Indian

and of a non-Indian by an Indian are death or any term of years or life imprisonment.[11] Penalties for assault with intent to rape for the same offenses are imprisonment for less than 20 years.[12] However, while rape offenses by Indians with non-Indian victims are included with other possible rape offenses, under the federal criminal code, rape or assault with intent to rape committed upon an Indian female by an Indian male are to be punished by imprisonment at the discretion of the court, which sentence cannot exceed life imprisonment.[13] The maximum penalties for inter-racial rape are greater than those for intra-racial rape when Indians are involved. Legislative history indicates that the distinction is based on Congressional recognition that rape was not viewed as a serious offense by the Indian.[14] The history of the Major Crimes Act, reflected in the limitation to rape of Indian women indicates Congress viewed Indian women as having lower morals and not to be given the protections provided to non-Indian women.[15] If the severity of punishments is to be reduced for Indian men, it should be reduced regardless of the victim. If Indian women deserve less protection than non-Indian women, males of both races should be punished equally. This discrimination was argued in Grey v. U.S., 394 F.2d 96 (CA 9 1968). The Navajo appellants had raped a non-Indian woman within the Navajo reservation. Their argument was that the difference in punishments based on the race of the victim was a denial of due process. They were subject to the death penalty as maximum punishment for rape of a non-Indian instead of life imprisonment for rape of an Indian. The Ninth Circuit held that, because the general

penalty for rape had a death sentence maximum, Indians raping non-Indians were in the same class as non-Indian rapists. The Court then noted that Indians have a peculiar and protected status as wards of the federal government, and that the penalties for Indian intra-racial rape were diminished by the Congress as a benefit to the Indians, including the appellants.[16] The Grey decision has been justly criticized.[17] There is no basis for the distinction in penalties for rape of a non-Indian woman or an Indian woman. Indian males are penalized more for rape of members of one race than another. This is within the prohibition of Loving v. Virginia,[18] in spirit, if not in strict constitutional terms.

The statutory scheme established by 18 U.S.C. Sections 1152 and 1153 also results in discrimination against Indian defendants charged under 1153, in rights available at trial. Section 1153 is an exception to the policy of leaving Indian intra-racial behavior to regulation by Indian tribes. It is an exception to the paragraph contained in 1152 removing Indian offenses against Indians from the federal enclave code applicable in Indian country. Thus, the only federal offenses, aside from those applicable on non-territorial bases, which are applicable to Indian intra-racial behavior in Indian country are those provided by Section 1153.[19]

Thus, the rule has long been followed that the federal courts lack jurisdiction to convict Indian defendants of any offenses contained in the federal enclave code except those specifically prescribed by

Section 1153.[20] The result of this restriction on the federal courts is that Indians prosecuted under the Major Crimes Act are not entitled in any cases to jury instructions on lesser included offenses, as there are no lesser offenses except those offenses in 18 U.S.C. Section 1153 which are lesser included offenses of others set out in the Section.[21]

The rule applicable to non-Indians is different. Under 18 U.S.C. Section 1152, the general laws of the United States providing for punishment of offenses within the sole and exclusive jurisdiction of the United States apply to offenses which involve non-Indians either as offenders or victims, and Indians. Section 1152 includes 18 U.S.C. Section 13, the Assimilative Crimes Act. Thus, in prosecutions of a non-Indian for offenses against an Indian, the full panoply of applicable enclave law, including applicable lesser federal or state offenses, is within the jurisdiction of the federal district court. This would also be true in offenses by Indians, involving non-Indian victims, which are not included within the Major Crimes Act.[22]

Thus, Indians charged under the Major Crimes Act are treated differently as a matter of law, because lesser included offense instructions will not be available to them when such instructions are available to non-Indians charged under Section 1152. In states generally, the failure to give requested included offense instructions when factual prerequisites are met is reversible error.[23] This is also the federal rule.[24] It is apparent that substantial interests or rights of defendants are involved in lesser

included offense instructions, as the interest or right is held in both judicial systems to sustain reversal when wrongfully denied.

The question is whether this differential treatment of Indian offenders charged under the Major Crimes Act, and Indian and non-Indian offenders charged under Section 1152 is a denial of due process because the requirements of equal protection are not met.[25] Criteria for permissible and impermissible distinctions in treatment on the basis of race in criminal statutes are stated in Loving v. Virginia, 388 U.S. 1, 18 L.Ed.2d 1010 (1967). The tests involved are whether the classifications drawn by a statute constitute an arbitrary and invidious discrimination, based on race, 388 U.S. 1, 10, and whether the classification is necessary to the accomplishment of some permissible federal objective, independent of the racial classification involved.

There is no doubt that the federal objective in the absolute division of jurisdiction between the federal government and the Indian tribes established by 18 U.S.C. Section 1152, and by judicial construction of Section 1153, is a recognition of Indian tribal autonomy in crimes involving Indian offenders and victims.[26] There can also be no doubt that it is within the power of Congress to create an offense, with no lesser included offenses. Congress is under no obligation to create crimes. But under the statutory scheme established to protect individual Indians, Indian defendants are subject to what may at times be a major disadvantage at trial, or prior to trial, because there are no lesser offenses usable for purposes of plea bargaining or for jury instructions and verdicts.

Once an Indian defendant has been indicted for a Major Crimes Act offense, respect for Indian tribal sovereignty should not be a consideration. The federal court has jurisdiction of the offense charged, and there may be a full trial on the facts of the case. If the individual Indian defendant wishes to request that his behavior toward other Indians be judged on the basis of several possible offenses, rather than on a major offense, his choice would not seem to result in a substantial or visible impairment of the right of Indians to make their laws and be governed by them in their behavior toward other Indians. The lack of lesser included offenses in effect, means that the right to trial of a misdemeanor level offense in Indian tribal court is a non-waivable right.

There are only two offenses among the Major Crimes which likely would not involve lesser included offenses, arson and carnal knowledge. There are four aggravated assault offenses which, in many cases, would normally involve the right to instructions on simple assault or simply battery. Specific intent offenses, such as assault with intent to rape, or with intent to kill, will often involve lesser included offenses if the defendant raises acute intoxication as a defense.[27] There is thus likelihood that Indian defendants charged under the Major Crimes Act might wish in a variety of cases to have lesser included offense instructions go to the jury. However, under a statutory scheme ostensibly designed for the protection of Indians generally, the individual Indian defendant cannot have lesser included offense instruction go to the jury.

One commentator has also pointed out that in cases against Indians under those Major Crimes Act offenses defined by state law, the United States may have to prove fewer elements to establish guilt than it would have to prove in a prosecution of a non-Indian for an equivalent federal offense under Section 1152.[28] This adds to the conclusion that, while Indians as Indians generally are supposed to receive benefits as a result of the statutory scheme embodied in Sections 1152 and 1153, Indians as individual people charged with crimes under Section 1153 often find themselves denied rights available to non-Indians and are subject to potentially more severe punishments for the same offense.

These discriminations must be eliminated from the statutory scheme established in Sections 1152 and 1153. Indians and non-Indians, if subject to federal jurisdiction in Indian country, should be subject to the same offenses, with the same elements, the same burdens of proof, the same rights at trial and the same maximum punishments.

NOTES:

1. Act of March 3, 1883, 24 Stat. 624; 109 U.S. 556, 562.

2. The Act of March 4, 1909, 35 Stat. 1151, added assault with a dangerous weapon; the Act of June 28, 1932, 47 Stat. 337, added robbery and incest; the Act of November 2, 1966, 80 Stat. 1100, added assault with intent to commit rape and carnal knowledge of a female less than 16 years old; and the Act of April 11, 1968, 82 Stat. 77, added the crime of assault resulting in serious bodily injury.

3. Incest was added by the 1932 amendment, but was not defined until the 1966 amendment.

4. See, e.g. U.S. v. Gomez, 250 F.Supp. 535 (DC NM 1966). Here, the indictment charged a crime which under 1153 was to be defined by state law, but the reference to state law was defective because no equivalent state offense existed.

5. Henry v. U.S., 432 F.2d 114 (CA 9 1970).

6. See U.S. v. Sharpnack, 355 U.S. 286 (1958).

7. Comment, Indictment Under the Major Crimes Act-An Exercise in Unfairness and Unconstitutionality, 10 Ariz. L.Rev. 691 (1968).

8. Id, Appendix I, p. 705. Citations to state laws for the states cited in this text are correct to 1971.

9. Id.

10. 18 U.S.C. Section 113(d).

11. 18 U.S.C. Section 2031.

12. 18 U.S.C. Section 113(a).

13. 18 U.S.C. Section 1153; Grey v. U.S., 394 F.2d 96 (CA 9 1968).

14. Note, Red, White, and Grey: Equal Protection and the American Indian, 21 Stanford L.Rev. 1235 (1969).

15. Id.

16. Grey v. U.S., 394 F.2d 96, 98 (CA 9 1968), cert. den. 393 U.S. 985.

17. See articles cited, notes 7 and 14.

18. 388 U.S. 1 (1967).

CONCLUSIONS AND RECOMMENDATIONS

Since other sections of this paper were written, the National Commission on Reform of Federal Criminal Law has published Volume III of its Working Papers, containing the Commission's proposals relating to federal criminal statutes on Indians, Indian country and criminal jurisdiction in Indian country. The Working papers contain a proposed Section 212, to be included in Title 25, U.S. Code, to replace present Sections 1151, 1152, 1153 and 1162 of Title 18, U.S. Code. The proposed section which will be set out below, will be referred to herein as Section 212. The Working Papers also contain a comment on criminal jurisdiction in Indian country which indicates that because "special knowledge and intensive study" is required to determine validity of present allocations of criminal jurisdiction, and the viability of any potential modifications, all that the Commission attempted to accomplish was a restatement of prior law, framed in terms of the proposed criminal code.

The proposed Section 212 is as follows:*

> 25 U.S.C., Section 212, Jurisdiction in Indian Country.
> (1) Indian Country Within Special Jurisdiction. Except as provided in subsections (2) and (3), Indian country shall be deemed to be part of the special maritime and territorial jurisdiction of the United States, as defined in section 210 of Title 18.*"Indian country" means:

*The sections numbers used in this draft are the section numbers of the proposed Federal Criminal Code.

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent and including rights-of-way running through the reservation;

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state;

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(2) State Jurisdiction Over Indian Country

(a) Offenses Not Involving Indians. Any state's jurisdiction over an offense committed within Indian country but not committed by or against an Indian or against his property, and the force and effect of its criminal laws with respect thereto, shall be the same as elsewhere within the state.

(b) Any Offense. A state's jurisdiction over any offense committed within the areas of Indian country listed below, and the force and effect of its criminal laws with respect thereto, shall be the same as elsewhere within the state:

(i) all Indian country within California, Kansas, Nebraska and Wisconsin;

(ii) all Indian country within Alaska, except that on the Annette Islands over which the Metlakatla community may exercise jurisdiction;

(iii) all Indian country within Minnesota, except the Red Lake Reservation;

(iv) all Indian country within Oregon, except the Warm Springs Reservation.

Except for Kansas, such Indian country shall not be deemed to be part of the special maritime and territorial jurisdiction of the United States.

(c) Matters Not Affected. Nothing in this subsection shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community, that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof.

(3) Offenses Committed by Indians

(a) Nonfelonies. Federal jurisdiction under this section shall not extend to any offense which is not a felony if it is committed by one Indian against the person or property of another Indian, unless section 202 of Title 18 applies.

(b) Multiple Prosecutions. Punishment of an Indian under the local law of the tribe for conduct constituting a federal offense which is not a felony shall be a bar to a subsequent federal prosecution of such Indian under this section. Otherwise sections 707 and 709 of Title 18 apply to a federal prosecution subsequent to a prosecution or similar proceeding under the law of the tribe as if such tribal psoectuion or similar proceeding were a prosecution in a state.

Subsection (1):

The first subsection of Section 212 provides that, with exceptions for limited state and tribal jurisdiction, Indian country is located within the special maritime and territorial jurisdiction of the United States. See proposed Sections 210, 211, of the Code. The definition of "Indian country" presently included as 18 U.S.C. Section 1151 is carried forward in unchanged form.

This subsection applies the entire proposed code of offenses to "Indian country". Under Section 201, proposed code, there is federal jurisdiction for all offenses if they are committed within the special maritime or territorial jurisdiction of the United States, if no jurisdictional base is specified for the offense, or if the special territorial jurisdiction is explicitly made a jurisdictional base for the offense. Thus, inter-racial offenses involving Indians and their property, and non-Indians and their property, as offenders and victims, will fall within federal jurisdiction.

One of the disadvantages of the present allocation of criminal jurisdiction in "Indian country" is inadequate federal prosecutorial services.[1] Difficulties in gathering evidence and testimony in remote areas, inadequate staffing, and pressing needs of urban areas are causes of these failures to enforce federal laws. Federal jurisdiction under present Sections 1151 and 1152 of Title 18 is generally treated as exclusive, and state law enforcement agencies often do not prosecute non-Indians for offenses against Indians in Indian country.[2] By contrast, misdemeanor grade offenses by Indians against non-Indians are within Indian tribal jurisdiction, and subject to tribal prosecution and punishment. Thus, it is likely that misdemeanor grade offenses by non-Indians against Indians will continue to go largely unpunished, as they have in the past.[3] It is also likely that, unless Federal law enforcement services, including prosecutorial services, are expanded, the present problem posed by too few federal prosecutions of offenders will continue.

States and Indian tribes may be able to attempt solutions for this problem under proposed Section 206 of the New Federal Criminal Code, which provides:

> The existence of federal jurisdiction over an offense shall not, in itself, prevent any state or local government from exercising jurisdiction to enforce its own laws applicable to the conduct in question.

However, it appears that this section may not apply to Indian tribes, and further that an independent source of authority over behavior of non-Indians toward Indians may be required before a state may assume

jurisdiction over the offense. Thus, the present Section 212 as proposed leaves in doubt the questions of whether Federal jurisdiction over offenses by non-Indians against Indians is exclusive of state or Indian tribal jurisdiction, and whether states or Indian tribes have authority to prosecute such offenses, at all.

The justifications for federal jurisdiction over offenses by non-Indians against Indians have included the protection of Indians, (pre-empting state jurisdiction) and the application of federal laws and punishments to non-Indians, rather than unknown tribal customary laws, and often severe customary punishments (pre-empting tribal jurisdiction). If the objective of protecting Indians from criminal acts by non-Indians remains as a justification, it should relate only to felony grade offenses, of enough seriousness that federal prosecution is likely. Absent increased federal law enforcement services, it would seem that the federal government is not providing adequate protection for Indians from misdemeanor grade offenses by non-Indians. As indicated earlier, the historical justifications for pre-empting tribal jurisdiction were that Indian tribal customary law was often unknown to non-Indians, that customary punishments were severe, and that customary law provided no means for Indian tribes to deal with non-Indians. With the advent of codes of law, defining offenses, with restrictions on punishments which Indian tribes may prescribe, and with adoption of judicial systems by many tribes, these historical justifications lack present meaning. Therefore, it would seem proper that either state governments or Indian

tribal governments should not be pre-empted from exercising jurisdiction over non-Indians committing offenses of the misdemeanor grade against Indians, Additionally, if such jurisdiction is concurrent with federal jurisdiction, any feared lack of prosecution by state officials would not have the impact of ending protection for Indians.

An amendment to subsection (1)(b) relating to the definition of "Indian country" should also be seriously considered. That is, that, the provisions of parts (a) and (c) including fee lands and highway rights-of-way within "Indian country" if located within a reservation or an allotment, should also be extended to cover rights-of-way and fee lands in "dependent Indian communities". See U.S. v. Martine, 442 F.2d 1022 (CA 10 1971).

Subsection (2). State Jurisdiction over Indian Country:
Subsection 2(a) of the proposed Section 212 is new statutory material. There are no present federal statutes on state criminal jurisdiction in Indian country, with the exception of statutes giving states general criminal jurisdiction in Indian country in some instances, set out in proposed part (b) of the new section. The comment states that the proposed subsection 2(a) generally restates present law.

Before the federal statutory definition of state jurisdiction in Indian country proposed in subsection 2(a) is adopted, it should be closely examined in light of the following:

First, the section is self-contradictory. Under the rationale of Supreme Court cases[4] holding states have jurisdiction over offenses by non-Indians involving only the person or property of other non-Indians, the federal government would appear to lack power over such offenses. This is because the Court has held that non-Indian intra-racial behavior has no impact on Indians sufficient to justify federal jurisdiction. Unless the Court reverses its position, or unless Congress provides a declaration that non-Indian intra-racial behavior can have an impact on Indians, the federal government would appear to lack power to grant states jurisdiction over offenses covered in proposed subsection 2(a). At best, there is doubt whether the proposed subsection would be construed as merely declaratory, or as an actual grant of power, or as a refusal by the federal government to assert any authority it may have in the area.

Secondly, jurisdiction over non-Indians should not be restricted to state governments alone. A non-Indian driving drunk on a reservation highway is not a menace to non-Indians alone. Indian tribal governments have as much right under present law to preserve the public peace as do state governments, and no reason appears to justify saying that non-Indian intra-racial violent criminal behavior will not have any conceivable impact upon individual Indians, or upon public order in Indian country. This section as proposed perpetuates the worst aspect of the present allocation of criminal jurisdiction in Indian country.

Thirdly, the proposed subsection fails to clarify the persistent question of whether Indian tribes may assume at least concurrent jurisdiction over non-Indian offenders in Indian country. The justifications for denying Indian tribes power over non-Indians have been the unknown and often severe Indian customary laws, and the fear of prejudice against non-Indians. These justifications, as noted, are no longer of general validity, and there seems no reason for denying Indian tribes authority, within the limits imposed by the Indian Civil Rights Act, over non-Indians.

If provisions are to be included in the new statute regarding jurisdiction over non-Indians in Indian country, when offenses are without victims or offenses involving non-Indian victims are involved, these provisions should answer the following questions:

(a). Can the federal government assume jurisdiction over the offenses?

(b). Is state jurisdiction exclusive of tribal jurisdiction?

The following alteration to the proposed subsection is offered as one alternative:

> (a). Offenses Not Involving Indians. Any state's jurisdiction over an offense committed within Indian country but not committed by or against an Indian or against his property, and the force and effect of its criminal laws with respect thereto, shall be the same as elsewhere within the state. Provided,
>
> the Secretary of Interior is hereby authorized upon request of the governing body of an Indian tribe recognized by the Secretary of Interior, to accept federal jurisdiction over such offenses, concurrent with state jurisdiction. Provided further, that Indian tribes may also exercise jurisdiction over such offenses, concurrently with the state or federal government.

This provision allows a maximum of flexibility in arrangements of jurisdiction over non-Indians. If Indian tribes have the need for and the resources to provide for increased law enforcement services in areas populated by or traveled by non-Indians, they may do so under the act. Further, if a tribe lacks resources to regulate non-Indian drivers and non-Indian intra-racial behavior, and states fail to provide adequate services, the United States may provide such services. If such an approach is adopted, further provision should be made in the manner of proposed section 212(3)(b) on multiple prosecutions.

The predominant need for law enforcement in Indian country is flexibility; a police officer on the scene of an offense, be he Indian or non-Indian, a tribal, federal, or state officer, should be able to take action to apprehend offenders, and to prevent further criminal activity. As we have noted, the complicated arrangement of jurisdiction presently followed is detrimental to efforts in law enforcement. Jurisdictional divisions are presently made in after-the-fact terms, the race of the offender, the race of the victim, and land title at the place of the crime. These tests relate primarily to the question "In which court should the offender be tried?" An officer noting a burglary in progress may have no idea of the race of the owner of the property, for example. The new law should allow a maximum in flexibility of jurisdiction, in order to allow more effective use of funds and personnel engaged in law enforcement in Indian country.

Subsection 3. Offenses Committed by Indians: This subsection continues present Indian tribal jurisdiction over Indian intra-racial offenses, when the acts constituting a tribal offense would also constitute no higher crimes than federal misdemeanors. The proposed subsection eliminates the inequalities in punishment on the basis of race, and other constitutional problems previously discussed in the review of 18 U.S.C. Section 1153. The removal of references to state law for punishments of offenses under Section 1153 is an especially good modification, as it ends differentials in punishments for substantially the same offenses, depending upon the race of the offender.

Present law is to the effect that federal jurisdiction over offenses under 18 U.S.C. Section 1153 is exclusive of both tribal and state jurisdiction. Proposed subsection 3(b) expands the number of applicable federal felonies in Indian country. In view of present complaints by Indians that federal prosecutorial services in Indian country are inadequate, Indian tribes should be allowed to punish crimes which constitute federal felonies, if the federal government has declined to prosecute such an offense. This authority, of course, would remain subject to present limitations on punishments assessable by Indian tribal courts.

One further beneficial impact of proposed subsection 3(a) should be noted. Proposed section 209, the assimilative crimes section, assimilates state offenses at a misdemeanor grade in the federal code. Since federal jurisdiction under 3(a) does not extend to federal misdemeanors, Indians

will not be subject to state law in their dealings with each other, at the whim of federal prosecutors. Thus, if an Indian tribal government approves behavior among Indians, the decision of the tribe cannot be "overruled" by invocation of state laws making the behavior criminal, under the old assimilative crimes section.

Proposed subsection 3(b) makes a desirable revision in present 18 U.S.C. Section 1152, by providing that trial of an Indian in tribal court, charged with an offense against a non-Indian of misdemeanor grade, may be a bar to federal prosecution. 18 U.S.C. Section 1152 required that the tribe punish the offender before federal jurisdiction would be precluded. It was, and is, based on the premise that tribes might not bring Indian offenders to justice, when petty offenses against non-Indians are involved.

The National Indian Justice Planning Association, Inc. would suggest that provisions directed specifically to problems of police officers in Indian country should be included in the proposed federal jurisdiction sections. The primary deleterious effects of the present allocation of criminal jurisdiction in Indian country fall upon the officer in the field. Specifically, we would suggest that broad authorization be given to allow officers serving any one of the sovereigns to enforce the laws of the other sovereigns. Such authorization would allow each law enforcement officer to be a "full-time" officer in his activities, and not just an officer with limited authority to protect persons of one race, from crimes committed by members of a certain race.

Ad hoc arrangements have been worked out in many areas, whereby state officers may enforce tribal laws against Indian offenders, and Indian tribal officers may enforce state laws against non-Indians. These arrangements should be given specific statutory sanction, in order that problems incident to dual capacity for officers, including costs of services for other sovereigns, liability and insurance, and protection from potential personal liability for actions in excess of technical jurisdiction, may be settled by agreement among the sovereigns. Such a provision or provisions would relieve some of the present difficulties posed for law enforcement officers by the intricate and cumbersome allocation of jurisdiction presently followed. Such a section would also perhaps allow continuation of the present basic allocation of jurisdiction, or the viable aspects of the allocation. More effective law enforcement in Indian country would thus be facilitated, without the taking of such drastic steps as the legislation of the 1950's precipitously removing the federal government from any law enforcement responsibility in several states.

The present work of the National Commission on Reform of Federal Criminal Laws provides an opportunity to review and alter the present federal statutory allocation of criminal jurisdiction in Indian country. While the Commission undertook nothing more than a restatement of present rules, in the context of the proposed code, its proposed 25 U.S.C. Section 212 contains several meritorious suggestions for revision. However, the Commission did not address itself to an important question: what is the impact of the present allocation of jurisdiction on the

effectiveness of law enforcement agencies in Indian country. It is our view that the present allocation of jurisdiction, and the present federal statutes, should be re-assessed with this question in mind. The analysis of the origins, the underlying premises and the rules presently governing the allocation of jurisdiction in Indian country presented in this paper, it is hoped, will assist in a re-examination of the present confused and inefficient system.

NOTES:

1. See Dine' Da Ho Ahgi', National Indian Justice Planning Association, 1971, pg. 170.

2. Davis, Criminal Jurisdiction Over Indian Country in Arizona, 1 Ariz. L.Rev. 62 (1959).

3. Id.

4. Draper v. U.S., 164 U.S. 240 (1896); McBratney v. U.S., 104 U.S. 621 (1881).